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RESTRUCTURING OF THE NUCLEAR REGULATORY COMMISSION

HEARINGS

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

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RESTRUCTURING OF THE NUCLEAR REGULATORY COMMISSION

WEDNESDAY, APRIL 27, 1988

U.S. Senate,
Committee on Governmental Affairs,
Washington, DC.

The Committee met, pursuant to notice, at 10:07 a.m., in room SD-342, Dirksen Senate Office Building, Hon. John Glenn, Chairman of the Committee, presiding.

Present: Senators Glenn, Heinz, and Sasser.

OPENING STATEMENT OF CHAIRMAN GLENN

Chairman **Glenn**. The hearing will be in order.

Today, we begin the first of two Committee hearings on the organization, the structure, and general oversight of the Nuclear Regulatory Commission (NRC). In particular, the Committee will consider a proposed bill from the Senate Environment and Public Works Committee to abolish the Commission and establish an agency run by a single administrator in its place.

As the Committee with jurisdiction over the organization and reorganization of the Executive Branch, we are working to answer questions about the costs, the feasibility, and the basic wisdom of such a step, just as we recently did with a bill to elevate the Veterans' Administration to a Cabinet-level department. I note that Senator Simpson is here this morning, along with Senator Breaux. Senator Simpson addressed that other problem in testimony earlier this year before the Committee. We are glad to have him back with us again this morning.

We have not yet had the benefit of the Environment and Public Works Committee's report to accompany the proposed bill. However, we think it important not to delay consideration of these issues, and for this reason we have already scheduled a second hearing on May 12th. We want to move this right along.

Abolishing the Commission would create a commercial nuclear regulatory agency headed by a single administrator. A primary question for our consideration, then, is whether we should have major policy and safety issues affecting this industry decided without the benefit of extensive and open discussion by a collegial body comprised of individuals reflecting different viewpoints.

Those who support this change argue that the administrator would be able to manage the agency more effectively, make more timely decisions, and have unmistakable accountability for the agency's performance.

While there is clearly merit to these arguments, we must examine whether any gains in accountability and efficiency would be outweighed by the potential for increased instability in the agency's regulatory program. For instance, under the single administrator scheme, the agency's management and policies would be subject to change with the unique agenda of each new administration.

To mitigate the effects of losing the commission structure, the creation of a nuclear reactor safety board reporting to the administrator is included in the proposed bill. The need for an independent nuclear safety board is obvious. It is difficult to have an agency which sets the rules for nuclear safety also conduct objective investigations when and if something goes wrong.

We recognize there are strong disagreements over the placement, composition, functions, and jurisdiction of such a board, which we hope will be aired for discussion at our hearings.

For example, should the board be completely independent of or placed within the agency? How many board members should there be? Who should appoint them? How long should they serve? Should there be staggered terms? For example, should they be appointed for terms that are not consistent with presidential terms? Should the board be permitted to establish its own criteria for what actions or incidents it investigates? Should the board be allowed to investigate "near misses," as we call them in aviation, or even events which might be considered precursors to an accident? In other words, how much should they become involved in prevention measures rather than just examining incidents after they happen?

These and other questions must be answered in advance in order to ensure that the board is truly independent and as effective as possible.

Finally, to ensure the agency's commitment to investigations of licensee wrongdoing, the proposed bill would statutorily establish an Office of Investigations, which would report directly to the administrator. Now, this is an important step in reestablishing the integrity of the agency's investigative function.

Uncovering wrongdoing and taking strong enforcement action based on a well-developed investigative report has a deterrent effect on anyone who seeks to undermine the regulatory process.

Moreover, in every case there is the potential that the licensee's misconduct, if proven, might also be a violation of federal criminal statutes. While civil enforcement action for wrongdoing has a deterrent effect, the possibility of criminal enforcement action has an even greater deterrent effect.

In this light, I have doubts about the provision in the proposed bill which would allow the administrator to squelch an investigation initiated by the Office of Investigations when the administrator, "determines that the public health and safety requires otherwise."

The deterrent effect of investigations is too important, and the lack of accountability for the administrator's unilateral decisions could send the wrong signal to the commercial nuclear industry. This is just one example that I wanted to point out.

This morning, we will hear from the General Accounting Office and the Commission. We are also pleased to have with us the authors of the proposed bill from the Environment and Public Works

Committee, Senator Simpson, the ranking minority member of the Subcommittee on Nuclear Regulation, and Senator Breaux, the Chairman of the Subcommittee. They have both done a great deal of work on these issues. We have worked with them in the past on these matters and I look forward to working with them again on this bill.

We all share the very same goals for efficiency and accountability in our government and, most of all, for the safe operation of nuclear power. That is the bottom line. So, gentlemen, we welcome you, and I do not know which one of you wishes to go first this morning.

Senator SIMPSON. Our Chairman, Mr. Chairman.

Chairman GLENN. Before you do that, I would like to enter into the record a statement by Senator Roth, who has been delayed in arriving here this morning. He has a speech he is giving on the trade bill on the floor. So I will enter his statement into the record this morning.

[The opening statement of Senator Roth follows:]

OPENING STATEMENT OF SENATOR ROTH

I would like to begin by expressing my appreciation to you, Mr. Chairman, and to Senators Breaux and Simpson, for the cooperation which you have all exhibited regarding legislation affecting the Nuclear Regulatory Commission.

The Committee today is considering legislation to restructure the Nuclear Regulatory Commission; included in that bill is a provision which would establish an Office of Inspector General at the NRC. This Committee's efforts to extend the Inspector General concept throughout the Federal government inevitably will come into conflict with other Committees with primary jurisdiction over Cabinet and regulatory agencies. The mutual interests of this Committee and the Environment and Public Works Committee with respect to the need for an Inspector General at the NRC became apparent early on. Our Chairman and Senators Breaux and Simpson are to be congratulated for their cooperation through which the Senate considered the Inspector General bill and will consider this legislation to restructure the NRC.

Like the handling of an eight hundred pound gorilla, the regulation of nuclear power must be dealt with very carefully. Through whatever structure that regulation is exercised, the regulatory body must, on the one hand, be able to act with deliberation on decisions to license construction and operation; but, on the other hand, it must also be able to act rapidly in the event that the public health and safety is threatened by a nuclear emergency.

Congress has restructured the regulation of nuclear power before. Most recently, in 1980, Congress reviewed and adopted an NRC reorganization plan, submitted under the now defunct Reorganization Act. That reorganization placed more authority in the office of the chairman of the NRC, particularly with respect to emergency situations.

Both this Committee and the Environment and Public Works Committee were convinced of the need to improve the internal accountability of the NRC. Accordingly, both Committees have recommended creation of a statutory Office of Inspector General. S. 908, which would do that, has already passed the Senate and I am optimistic it will be enacted yet this year.

The question now is whether the authorities currently dispersed among five commissioners should be reassigned to a single administrator and a 3 member safety board. Apart from that question of the efficacy of the structure, there is a question of the relative independence of this new regulatory agency.

We must remember, through all our deliberations on structure, a principal purpose of regulation of nuclear power is protection of the public health and safety. The structure ultimately adopted must facilitate that purpose.

Chairman GLENN. Senator Roth has been very supportive in this area, has a tremendous interest in this matter of nuclear safety, as we all do, and has played an active role in the past, and we look forward to all of us working together on this.

So, Senator Breaux, please proceed.

TESTIMONY OF HON. JOHN BREAUX, U.S SENATOR FROM THE STATE OF LOUISIANA, AND CHAIRMAN, SUBCOMMITTEE ON NUCLEAR REGULATION, COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS [1]

Senator **Breaux**. Thank you very much, Mr. Chairman.

I am delighted to be able to spend a few minutes before your Committee to discuss what we have been doing over in the Environment and Public Works Committee. I am particularly pleased to have with me our ranking member of our Subcommittee, who has been most involved in the legislation. His experience as ranking member, as Chairman, and as ranking member bring the history of the development of this policy to our Subcommittee and I am grateful for his help and assistance to me in serving as Subcommittee Chairman.

Mr. Chairman, we are here not to tell you how things should be done, but to merely bring you up to date on what we have been doing. We have for the last 14 months been looking at this issue. We have had over 12 separate hearings on the Nuclear Regulatory Commission; we have had six specifically on reorganization. We have spent literally hours, days and weeks looking at the whole question of nuclear power, how it is regulated, how it has been handled in the past, and what may be the best approach towards handling it in the future.

We have come to the conclusion, Mr. Chairman, that the problems with the nuclear industry are not technical problems. It is not the science that is the problem. It is people problems and it is organizational problems, and those are the problems that I think we in the Congress are particularly able to address and to handle and to restructure and to improve in order to correct a perception that exists in this country.

And the perception is not good for those who believe that nuclear power and nuclear energy may be important to this country's energy mix in the future, and I happen to think so.

I think the technology is there; I think it is workable and I think that we can make it safe. Our job in the Congress is to make sure that the people of this country believe that we are doing enough to ensure their concerns that regulation, solid regulation, good regulation, an arm's-length regulation is being provided for this industry which can be so important to the survival of our country's energy needs, and yet at the same time potentially so dangerous if misused.

The people problems that we have found are problems that run from people who fall asleep at the controls, who drink too much on the job, who have taken drugs while on the job. Those are situations that are unacceptable, certainly, in something as delicate as the nuclear industry.

The organizational problems are what we have spent a great deal of time on, and what we are recommending, and it has passed our committee by a unanimous vote, is a reorganization of the Nuclear Regulatory Commission.

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[1] See p. 95 for Senator Breaux' prepared statement.

One thing that we have found is if you want to have something not done very well, appoint a commission to do it. In light of the history of nuclear power, I can understand why a commission was appointed in the beginning.

It was a new industry, people were scared of it, it had awesome power. We just saw what happened during World War II when it was used for military purposes. I think at that time, people did not want to give one person the civilian authority over something that was so powerful and so potentially dangerous, so a commission was created.

In 1988, I think that commission concept is outdated. What we have recommended is a single administrator, an administrator who would be appointed by the President, along with a deputy. The Senate would be involved through a confirmation process to ensure that that person would be the very best person to serve in that capacity.

The existing functions of the Commission would be rolled into that single administrator and that person would be responsible. We need a person who we can pat on the back when they do a good job. We also need a single person that we can focus in on when they mess up, one person who would be the person in charge, much like a corporation is run, a business is run, with a single chief executive officer in charge.

Other agencies in Washington have done well with that approach, the FAA single administrator, EPA single administrator, and we can point to many others. So we are recommending a single administrator. We are recommending that the Nuclear Safety Agency, as we would call it, would be an independent establishment within the Executive Branch.

We also provide, Mr. Chairman, for establishment of an independent inspector general for this new agency, something that I know the Chairman has followed very closely, who would independently investigate charges of waste, fraud and abuse within the agency.

We believe that the public perception problem is very real and we believe that an agency that investigates itself for alleged wrongdoing is not serving the public very well. Therefore, we establish an independent inspector general to look at those allegations, to ferret them out; if they are real, to prosecute them and to turn them over to the proper authorities, and if there is no basis for it, of course, also to make that finding. But it should be independent, and our legislation does that.

We also elevate within the agency an Office of Investigations. The Office of Investigations would be the primary arm to investigate the licensees, those power plants, those nuclear plants around the country that the NSA would be responsible for regulating. The Office of Investigations would investigate alleged wrongdoing in those agencies; those are the licensees of the agency. Therefore, an Office of Investigations would be the appropriate and proper arm to investigate those allegations.

The two offices, I would add, do not overlap. The Inspector General looks for waste, fraud and abuse within the agency—their own employees, their own management people, their own administrators—whereas as the Office of Investigations would look at the wrongdoing or problems, criminal or otherwise, of the licensees, the power plants, the companies, the nuclear industry.

We spell out what their duties are, so we do not have a convoluted process whereby some would argue that their responsibility is this, others would say, no, it is this. We would spell out statutorily what their responsibilities are.

The legislation would then create a three-member safety board. The purpose of the safety board would be to investigate independently certain types of categories of incidents in the nuclear industry.

"Incidents" is a nice word for an accident. The nuclear industry calls them incidents. I would call them accidents. The independent safety board would function much like the FAA National Transportation Safety Board.

I think it is incredibly important, again, from a perception standpoint, and also from a standpoint of doing our job better, to have an independent safety board to look at these types of accidents. Why? Perhaps one of the reasons for the accident is wrong regulations by the agency, and I just do not think it is too good to have the agency investigating accidents that may be partly responsible or caused by improper rules, regulations, or supervision by the agency itself.

Therefore, an independent safety board would look at a certain category of accidents. Why not all accidents? Because when someone drops a bucket of paint or spills a barrel of oil, that is not necessarily the type of incident that we want investigated by an independent safety board; it is not severe enough. So we spell out that there are certain categories of accidents that the independent safety board would look at.

How do we guarantee that the board is independent? Well, number one, it is a presidential appointment of the chairman and he serves for a fixed term. He is independent because he cannot be removed by the President unless he is guilty of malfeasance in office. That ensures that the Safety Board would be independent and be able to make recommendations on the cause of an accident, just like the NTSB does, and let the Nuclear Safety Agency make a determination on what should be done.

But I think that that independent safety agency is extremely important. The head of that agency would be confirmed by the Senate, nominated by the President. The other two members would be appointed by the administrator of the Nuclear Safety Agency.

So, Mr. Chairman, that is the outline of our legislation. We find that there is a crying need for reorganization, restructuring, so we can rebuild the confidence of the American people and let them know that we are doing our very best to ensure that the industry is being regulated, that there is not a too cozy relationship with the industry between the regulators and the regulatees.

I think this approach would go a long ways to solving that problem.

Thank you.

Chairman GLENN. Thank you, Senator Breaux.

Senator Simpson.

TESTIMONY OF HON. ALAN SIMPSON, U.S. SENATOR FROM THE STATE OF WYOMING, AND RANKING MEMBER, SUBCOMMITTEE ON NUCLEAR REGULATION, COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

Senator SIMPSON. Thank you very much, Mr. Chairman. I am getting very adept here at testifying before your Committee from time to time. I see you have a lonely vigil there as Chairman. That is what happens when you get in the majority; nobody shows up. I remember those 24 hearings.

Chairman GLENN. I remember with some nostalgia the minority days around here, too.

Senator SIMPSON. Yes, I know you do.

Chairman GLENN. Flit in, flit out, ask your questions.

Senator SIMPSON. That is right; no more of that. Then you say, would one of you not come just for a couple of minutes? So it goes, but you do a splendid job.

Chairman GLENN. Wait until we try and get a quorum to vote something out; then we have a real problem.

Senator SIMPSON. That is so true, but you do it with great patience and skill, which is your persona. You are an amazing gentleman, I have found in my nine years.

Well, it is good of you to listen to Senator Breaux and I present our thoughts on this, and he has covered them very well. It is a pleasure to work with him. I commend him for his leadership here. It is something I worked on before John came to the Senate. It has been a very important thing.

He mastered the subject of nuclear regulation in the Subcommittee and in the full Committee on Environment and Public Works, and I commend him in leading the effort.

Indeed, as you know—and you worked so hard with your nuclear issues in non-proliferation—the issue of what this commission is supposed to do is simply to assure the public health and safety. There is no other mission, and how best to organize the agency that carries out that mission is what we are about.

I think what we have here is a balanced and responsible legislative solution. It is the product, as the chairman has said, of two years of intensive work on a wide range of issues—operation, organization; we looked into it all. I will not address those again.

But there is something in my mind which, at least personally, is the single most important and far-reaching provision in the bill, and that is the converting of the Commission to a single administrator agency.

We considered that in Committee. I was reminded of the language of the Rogovin Report. I was the ranking member and Senator Hart was Chairman during Three Mile Island. That report, I still think is one of the best because it is attributed; everything in it is attributed. It is not emotion or conjecture.

The Kemeny Commission and the Rogovin Report both recommended they have a single administrator, and I think the language is important to review what they said, and it is very brief. They said, "The Nuclear Regulatory Commission itself is not focused, organized or managed to meet today's needs. The Commission is incapable in its present configuration of managing a comprehensive national safety program for existing nuclear power plants and those scheduled to come on line in the next few years adequate to ensure the public health and safety". That was the Rogovin Report.

We examined the issue in careful detail, 13 years of experience with the collegial approach to nuclear regulation, 8 of those after Three Mile Island, and an attempt to strengthen the authority of the Chairman, and we found that the collegial approach has simply not worked. It is a collegial body that does not college.

We found very little of that takes place. Somewhere between—I think this is alarming—between 70 to 90 percent of the decisions made by the Commission are actually made without the benefit of the five Commissioners actually getting together—they do not speak—and discussing the decision in a collegial way. That is what we had in mind, things like we do in a mark-up in our legislative experience, or as the American public expects the process to work.

Instead, what they do, Mr. Chairman, is they circulate notation votes. They make decisions through the "Commission tracking system"—I do not know what quite that is, but you can only conjecture—or resort to relying on their legal or technical assistants to meet and discuss these issues. There were two layers there before and they still have vestiges of that.

Very rarely do the Commission members' decisions ever serve as the result of all five members getting together to hammer out an issue. Whenever they try to function or interact, when two or three gather, or even two, then they violate the sunshine law.

We have learned that you do not dare get in there and toy around with that one, but let me tell you, the sunshine law is preventing the full activity of public health and safety in the United States because they cannot function under it. You either change that or you go to a single administrator, one or the other. It would be less emotional to do this than to dabble with the sunshine law. We have all found that, and I was a great supporter of that before I came here in State legislative activity.

Well, that is enough. I just want to say, though, Mr. Chairman, that this is not a shortcoming or indictment of this particular Commission. Indeed, it has been true since 1975 when the Commission was first established—it has been true whether we are talking about Republican or Democratic commissions, and it is true for virtually every commission-type agency in this town—the notion of collegial decisionmaking is a myth, an absolute myth. It disappears in a mass of staff effort.

Secondly, and assuredly, we found that the commission-type approach has been totally ineffective, indecisive, inefficient. We cannot say any more clearly what both Kemeny and Rogovin did in 1980—a lack of responsibility, as our Chairman says, a lack of accountability on the part of any single individual to either receive credit or disapproval, policy decisions turned over to the Commission's vast advisory board structure for resolution of the context in individual adjudicatory proceedings.

Again, and the Chairman has covered it, there was a reason for doing it. It was because they were dealing with the development and production of nuclear weapons. That is no longer the case. That is not the mission.

He has named the groups that function very well in this city. FAA, EPA, Food and Drug, and many others certainly more efficiently and effectively would be served than if run by a five-headed commission.

So I think that this single change, replacing this outdated, unworkable structure with an agency headed by one individual responsible and accountable to the Congress and the American public for the regulation of nuclear power will go further than anything we will possibly do to restore confidence and credibility in the regulatory process for commercial nuclear power.

I thank you very much, Mr. Chairman.

Chairman GLENN. Thank you both for your testimony. I do have a few questions here if you have time to remain for these. Otherwise, we could submit them to you for response, but I would like to run through these.

First, on the idea of a single administrator, did you consider providing the administrator with a term of office, as was suggested by the Kemeny Commission in its October 1979 report to the President on Three Mile Island? What was your thinking on that, Senator Breaux?

Senator BREAUX. I think that, you know, all of the options were considered, Mr. Chairman. I think that what we have come down on is that the President, who is going to be mainly involved with the policy of the agency, along with the Congress, would be the person who appoints the deputy and the administrator, and the Senate confirms. So both policy ends of the issue would be involved in selecting that person and he would serve at the desire of the President.

So we did consider it and thought that the protection of the confirmation by the Senate would be the proper approach.

Chairman GLENN. Did you consider making this a term that is not coterminous with the President's? The President would appoint the administrator, I presume, subject to Senate confirmation, but would appoint for a five-year period or a seven-year period or something like that that would make it much more of an apolitical appointment.

Senator BREAUX. Well, you know, that is an option, I guess. I think that we have come down on the side of bringing the Senate and President together with a person, whoever that person might be, who is going to be following some of the policies of the administration as well as looking after the policies determined and set by the Congress.

A President should be able to have the person that they feel can best carry out the policy in this area that they would like to see in that position, and a new President should have the option of having his person appointed.

The overall policy dictates are determined by the Congress, working with the administration. We felt that was the proper way to do it.

Senator SIMPSON. Mr. Chairman, I would add that the bill provides for Senate confirmation of both the administrator and the deputy administrator, as well as the inspector general, and that, I think, ensures that the Legislative Branch will have an important role.

We restated the statutory requirement that the agency keep the Congress fully and currently informed—that is language from the bill—to ensure that the Executive Branch does not withhold information from us on the agency's operations.

Senator **Breaux**. I think the other thing, too, Mr. Chairman, is we have seen other agencies with single administrators like FAA and EPA—that policy and those types of appointments have worked well. It has not created problems.

We have something to look at; we have some history out there with these types of appointments and how they have worked, and it seems that they are working very well indeed.

Chairman **Glenn**. I do not want to pursue this too far. We can talk about it separately later, but we have had some political problems in the nuclear area regarding the international application of nuclear law that changed dramatically from one administration to the next.

We passed the Nuclear Non-Proliferation Act some years ago in 1978. That was my legislation, and we debated for about a year-and-a-half on whether to go with a government-to-government approach or whether we were going to try and get American industry to be involved in everything that was nuclear all over the world and make that our means of information and our means of control.

This was debated at great length back during the Carter years. We worked with them for about a year-and-a-half and finally decided after all the debate and discussion that we would go with the government-to-government approach, with the idea that our arms negotiations with the Soviet Union would try to get nuclear arms negotiated downhill. We would pledge to do that and meanwhile, try and sign up as many nations under the Non-Proliferation Treaty to get their agreement not to go that route. We would be better off trying to do that on a government-to-government basis.

Now, when the Reagan Administration first came to office, during the transition period, they had a new proposal that literally decimated that law; I mean, it just knocked the props out from under it.

The man writing that, I believe, at the time, Mr. Malone, I do not know what his job is now, was the one that was doing the work on that and he really knocked the socks off of us, or tried to.

We did a lot of guarding of our tail feathers around here on that particular piece of legislation for about a year before we really got things back onto the original intent of the Nuclear Non-Proliferation Act which we just finished a year-and-a-half or two years debating shortly before that. 1978 is when we passed it, so it was two years before.

That is the reason I am a little leery of just saying a presidential appointment is enough. We saw what happened with a presidential appointment in this related nuclear area. I am not saying it would be exactly the same, but we have seen what happens in these matters.

And I would hope that once we have debated this in the Congress that these policies do not just become the whim of a new administration as a matter of who can sell a new President on a new program and dump the whole works that we have debated out over some period of time.

Senator Breaux. Mr. Chairman, I would point out perhaps as a point of difference on the difference in the example you have cited and this that this is a regulatory agency and they operate pursuant to policies and rules and principles established by the Congress, and they are pretty much written in concrete and they are pretty clear.

In the example you cited, you are talking about some more generalized policies that can change at the whim of whoever is directing the policy. We are talking about this agency being more—it is a regulatory agency and the rules and the regulations have been set by the Congress and they do not have that much latitude, and I think that is one of the differences.

Chairman Glenn. I do not disagree with that. It is a different situation. I only brought up that making this solely a political appointment to run for the same duration of time means that every time it turns over, it is liable to take a new political twist that I am not sure would benefit in the nuclear industry.

Senator Simpson. Well, Mr. Chairman, I would just add I think one of the most sensitive single administrator jobs in Washington right now is EPA, and Lee Thomas—we may not all agree with him on either side of the issue or all sides, but he is, I think, doing a splendid job.

I do not concur with him always, but that is what we would envision, and subject to Senate confirmation and good, long debate and hearings; also Senate confirmation on the deputy, and also Senate confirmation on the inspector general. I think those things would be helpful.

We will try to certainly hear any recommendation and, of course, you will make them and participate in them, but we can work, I think, toward what we need to do, which has got to be better than what we are doing now.

Chairman Glenn. The bill does not specifically designate the Nuclear Safety Agency as "an independent regulatory agency." Do you intend that the new agency be an independent regulatory agency?

Senator Breaux. Mr. Chairman——

Chairman Glenn. Before you answer, I might say this. The Justice Department opinion is that the new agency, unlike the Commission, will not be an independent agency because the administrator is subject to removal by the President for any reason.

You mentioned a moment ago that you felt it would only be malfeasance in office, as I understood it, for which he could be tossed out. He could not be tossed out just at the pleasure of the President. Is that correct?

Senator Breaux. I was referring, Mr. Chairman, to the Safety Board.

Chairman Glenn. Oh, okay.

Senator Breaux. The Safety Board would be appointed by the administrator and the Safety Board would not be able to be removed except for malfeasance in office, so that would ensure their total independence and be able to perform their job.

I think the agency that we are talking about setting up, NSA, the Nuclear Safety Agency, would be, in terms of the words of art, an independent establishment within the meaning of the Federal rules and regulations.

You know, it is as independent as we are going to get. Someone has to make the appointment. The fact that the President makes the appointment, and he serves at the pleasure of the President with the confirmation of the Senate, does not make them either more or less independent than the agencies we have in Washington that seem to be working very well in that regard.

I do not know how we can have someone designated as the head that would, you know, be a more workable situation than this. We have certainly looked at a number of options, but, you know, the confirmation of the Senate, the oversight of the Senate and the House to assure that he is carrying out the functions as we think he should according to the law, I think is a guarantee of the workability of this system.

Chairman GLENN. Yes.

Senator SIMPSON. Mr. Chairman, I think we want to avoid—I do, and I know the Chairman does, too—the politicizing of the appointment process that we see, for example, at the National Transportation Safety Board. We do not need to go through that.

But with this where we have the chairman appointed by the President and two other members appointed by the single administrator, I think that would ensure that we get these first-rate people with solid technical and investigative credentials.

With the appointment process and the fact that the board is independent but inside the agency, I think we would hope to ensure that the board understands and appreciates what the regulatory perspective is and will work together with the agency instead of being insular and isolated and polarized.

The pattern here is what we have done under the recently reported clean air bill, except this board is three members rather than five.

Senator BREAUX. We have something that we would add to it, Mr. Chairman, that when we create the Nuclear Safety Agency as an independent establishment, ordinarily it would mean that they would be subject to OMB's supervision.

Our legislation further spells out very clearly that with regard to requirements of being subject to OMB that the Nuclear Safety Agency with regard to their regulations would not be.

Now, with regard to other activities under the Paperwork Act, they would be, but with regard to the issuance of regulations they would be entirely independent, and I think that is a feature that is very, very important and helps to ensure greater independence for the agency.

Chairman GLENN. Well, I agree with you one hundred percent on that, but I have a couple of questions about it. The absence of OMB checking on what they are doing on proposed or final rules—I think it is good that that be out from under OMB.

The NRC wears two hats. It has responsibilities to the Congress and it has responsibilities in the other direction. It sits out there with responsibilities not only to the administration and the Executive Branch, but also directly to the Congress, because we felt it was that important back when this was formed from the old AEC.

It was given that independent status very intentionally. I agree that as a premise, an OMB review of everything not be done. But, it seems to me then, on the other hand, if we are not to have it under OMB, almost all our other Federal safety and health agencies such as the FAA, FDA, Food and Safety Inspection Service, Mine Safety and Health Administration, Occupational Safety and Health Administration, and Food and Drug Administration, are all subject to that kind of OMB review.

If we are not to have that kind of independent review from the Executive Branch, which I do not think we should have then it seems to me we need an independent review from some organization. There has to be some group that is reasonably independent that can monitor what the agency's rules and regulations are going to be. That is more of a statement than a question, I guess, but what would be your response to that, either of you?

Senator SIMPSON. Mr. Chairman, if I may, I would just say that what we do here is simply exempt for the purposes of the Paperwork Reduction Act, which is that vehicle that you described well where OMB has intruded itself deeply into rulemaking procedures of Executive Branch agencies—we simply say that they are exempt from this process, ensuring that the substantive decisionmaking be done by the agency and not OMB.

But we could work with you on any oversight or examination from there. We just want to be sure they are exempted first.

Chairman GLENN. I believe the General Accounting Office will recommend in their testimony a little later today that the Advisory Committee on Reactor Safeguards (ACRS), and the Atomic Safety and Licensing Board be retained in any transition to a single administrator scheme.

Do you agree with that recommendation?

Senator BREAUX. I think our legislation would reflect that they are, in fact, retained.

Chairman GLENN. Okay. How would we make an independent check of this? Would the group of three serve at the pleasure of the administrator? Should they have more independence?

Senator BREAUX. For the Safety Board, you are talking about, Mr. Chairman?

Chairman GLENN. Yes.

Senator BREAUX. The Safety Board is independent in the sense that no one can get rid of them unless they are guilty of malfeasance in office. So that ensures the fact that they are charged with a mission, they carry out that mission, and they cannot be removed unless they are guilty of malfeasance in office.

That gives them the independence, I think, to investigate accidents freely without any threat from the NSA as being too strong in their investigation or, in fact, not strong enough. So I think that ensures the independence of the Safety Board, the fact that they know that they cannot be just kicked off the board because someone does not like the way they are performing their job.

Chairman GLENN. Yes. Would the board also have authority to investigate situations that they think might be developing that are dangerous rather than waiting until after something happens?

Senator BREAUX. Well, the real operation of the board, at least in my thoughts about it, is to investigate accidents and nuclear incidents, and we try and establish some criteria for those types of incidents that they would investigate.

We do not mean that they would investigate everything that happens. An oil spill, perhaps, or a paint bucket that falls or a ladder that falls and injures someone is not necessarily the type of incident that we want a safety board to be investigating.

We are talking about significant events that they would be called upon to investigate. The National Transportation Safety Board, for instance, does not investigate a violation of a worn seat belt in an airplane, but they certainly investigate an airplane that crashes.

So what we are trying to say is that the Safety Board is an important thing and it should look at important events, and we have tried to categorize those events. If you look at the criteria and you look at past history, you would have our Safety Board investigating about eight, maybe ten incidents a year if these criteria were in effect over the last couple of years.

Chairman GLENN. The bill does provide that, for purposes of the Paperwork Reduction Act, which you mentioned a while ago, the new Nuclear Safety Agency, quote, "shall be treated in the same manner as an independent regulatory agency under that Act."

The Paperwork Reduction Act provides that in certain specified circumstances, a majority of the members of an independent regulatory agency may vote to override an OMB decision.

Now, this is not going to be under OMB per se, but how would this override mechanism work in the case of an agency headed by a single administrator?

Senator BREAUX. It sounds like that criteria would not apply. I mean, you have to look at it. If it talks about the majority vote and you only have one, I guess one would be a majority. But I am not sure if that criteria would fit what we are talking about. Maybe I do not understand the question.

Chairman GLENN. The safety group then would be, what? They would be only advisory to the administrator?

Senator BREAUX. Oh, sure. The Safety Board would be charged with investigating these types of incidents that occur. They do not regulate, they do not penalize, they do not bring charges. They give an independent report on what caused it, and then that goes to the NSA and they look at that independently-arrived-at discussion of evidence and the facts and then the regulatory agency, of course, would then make their recommendations.

Chairman GLENN. And if their views were not given what they thought was some credibility or were not taken into consideration, they would have no appeal outside just griping to the administrator?

Senator BREAUX. That is correct. It operates like the National Transportation Safety Board. This is an independent fact-finding, investigating team that will not color what happened in any way, shape or form, but just tell the NSA what has happened and then they make the decision on what action should be taken.

Chairman GLENN. The National Transportation Safety Board has five members who serve for five years, and the Chemical Safety Board proposed by EPA and the Environment and Public Works Committee in its clean air bill have five members who also would serve for five years.

Was there any particular reason why you proposed three members and three years as the composition of the nuclear safety board?

Senator BREAUX. No, I do not think there is any iron-clad reason for that. I mean, I think we are trying to make it a streamlined commission, a board that is functional, and I think with three members, the way it is appointed, could function as well as five, and probably do so more expeditiously and certainly at less cost.

Chairman GLENN. Do you view this board as just being transitional in nature? I believe you sunset the board in 1993. Would they go out of existence then, or would they have to be specifically reauthorized, or what?

Senator SIMPSON. I do not recall, Mr. Chairman. We have our senior staff. Tim could refer to that.

Chairman GLENN. Does staff want to comment? Go ahead, if staff wants to comment.

STAFF. The legislation is based upon a proposal that Senator Biden had made and the provision itself was drawn from a sunset provision in the Biden legislation.

Chairman GLENN. Just a couple more questions and I will turn it over to Senator Heinz.

You have a $5.5 million authorization limit for the board and an FTE ceiling of $55 million. You have mentioned the National Transportation Safety Board. They have a budget of about $25 million and a staff of 350, and the Chemical Safety Board would have an annual budget of $25 million and no limits on the staff.

I know we are dealing in different fields, and you cannot compare them directly. I would not object to putting more money and more people in here.

Senator BREAUX. Well, the difference is very vast. You know, when you are looking at the functions of the National Transportation Safety Board, you are looking at railroads, you are looking at the entire U.S. aviation industry. They are called on to investigate accidents all over the world.

We are talking about a board that is going to be narrow in scope. Their functions will be far less broad-based. Their area of responsibility will be far less than the National Transportation Safety Board. They are dealing with one industry as opposed to several industries.

So, you know, I think the numbers probably in relation to the work that is expected are probably very, very comparable.

Senator SIMPSON. Mr. Chairman, the savings in staff alone, each of them tending a commissioner over there, would be extraordinary. There is not any concept of how much money you would save by going to the single administrator as to what the over-layering now is in the NRC of staff and lawyers and secondary lawyers, and it is extraordinary. You have to see it to believe it.

Chairman GLENN. Just one more question, and this gets back to my concern about some independent review group. Do you know of any precedent in the Federal Government for granting an agency operated by a single administrator the kind of independence from OMB review or other independent review that you propose here?

Senator BREAUX. Probably not. I think what we have tried to do—the NRC is totally, completely independent under its current operations, and what we are trying to do is come somewhere between having them totally independent like they are now under the commission form and having them totally subjective to the rules and whims of OMB.

So what we did was to say that in the area of regulations, the most critical function of an independent agency, that they would not be, in fact, subject to OMB's whims and changes and other considerations.

Their primary function is safety and their rules and regulations should be enacted without having to ask OMB if they can do it. So we have kind of split the difference. It is a different approach.

Chairman GLENN. Yes. I agree with changing from the OMB approach that everybody else falls under, because I think NRC is unique in the way it is organized. It is independent but has responsibilities to both us in the Congress and the administration.

But I also think that it is difficult to set up something as important as this without having some rather independent group to monitor what their draft proposed and final rules and regulations are going to be.

Senator BREAUX. Well, you know, it is really our responsibility. You know, the Congress has to be involved in these matters. We tell them what the law is and we have a responsibility, I think, to ensure to the American people that they follow the law. Oversight by this Committee, oversight by our Committee, I think, is a very, very important role, and we intend to follow it up.

Chairman GLENN. Well, I am sure we are going to be wanting to get more testimony on that particular item.

Senator HEINZ.

Senator HEINZ. Mr. Chairman, first I have an opening statement I would like to put in the record in its entirety.

Chairman GLENN. It will be included in the record.

[The opening statement of Senator Heinz follows:]

OPENING STATEMENT OF SENATOR HEINZ

Mr. Chairman, I am pleased that the commitee has this opportunity to review proposals to restucture the Nuclear Regulatory Commission. The topic of discussion—independent oversight, audit, and investigation of nuclear activities—is one we have extensively reviewed. The provisions of the Environment and Public Works Committee's legislation track very closely with provisions in S. 908 and S. 1085, both of which the Governmental Affairs Committee has favorably reported. I am a cosponsor of both measures.

Restructuring of the Commission is long overdue. Following the near melt-down at Three Mile Island, the Kemeny Commission called for NRC restructuring. The committee took a strong step in that direction with S. 908, legislation to create a statutory inspector general at the NRC. The NRC provisions of that measure were withheld pending action by the Environment and Public Works Committee.

That committee now proposes to create a Nuclear Safety Agency, replacing the current 5 member Commission with a single administrator. A statutory inspector general, and a statutory office of investigations, would be established, and their independence protected. More significantly, an independent nuclear board, with three members, would be appointed to review and investigate threats to public health and safety at licensed nuclear facilities.

The goal of the legislation, as I understand it, is to streamline the NRC, strengthen its audit and review functions, and prevent any possible conflict of interest between NRC management and staff, and the industry they are charged with regulating. Hearings held by this committee last year brought out all too clearly the very real threat posed to public safety when a regulatory agency places the needs of the regulated above the needs of the general public.

While the proposed legislation takes many steps in what I believe to be the right direction, today's hearing will help to answer the remaining questions I have. Specifically, should the Administrator of the Nuclear Safety Agency control two of the three appointments to the Nuclear Safety Board? Is the jurisdiction of the board properly defined? Will three members have the necessary expertise to review the broad range of public health and safety issues raised by the agency's licensees?

I do want to commend my friends Senator Simpson and Senator Breaux for their efforts to enhance the safety of nuclear operation in our country. Their legislation has been carefully crafted and, if my question can be answered, I would like to work with them and the Governmental Affairs Committee to provide a new role for nuclear safety and quality assurance.

Thank you, Mr. Chairman.

Senator HEINZ. I want to commend John Breaux and Alan Simpson for this legislation. I have reviewed it carefully. I think that you have done an excellent job in taking to heart what, in part, would appear to be the recommendations of the Kemeny Commission.

Senator Simpson and I got a firsthand view of one of the problems that we ran into at Three Mile Island. Senator Simpson, Senator Hart and I were circling over Three Mile Island just as they were assuring us that everything was fine and they were venting radioactivity into the air, which explains why Senator Simpson's hair fell out. [Laughter.]

Senator SIMPSON. I wondered what it was. [Laughter.] Look at you, though, you rascal. [Laughter.]

Senator HEINZ. Well, I held my breath for an hour-and-a-half. [Laughter.]

I must say that in my State of Pennsylvania, nuclear safety is not a buzz word; it is taken very seriously. It is a matter of public health and safety, but on at least one, possibly two occasions, counting Peach Bottom, it has become an oxymoron.

I think that your legislation is going to make as certain as we can, and there are limits as to anything that human beings, legislators, no matter how intelligent, wise, or well-intended—how we can ever give a one hundred percent perfect assurance to my constituents or anybody else's, but this is a vast improvement.

I have only one question about the legislation, and it is this. You create a Nuclear Safety Board composed of three people. Two of them are appointed by the administrator, one is appointed by the President, the chairman, and the chairman is subject to confirmation by the Senate.

I do not quarrel with that. Senator Simpson, you explained a moment ago why having an administrator will save on staff, but I have this question. Would it not potentially give the agency control of the board to have two of the three members basically appointed by the administrator, and if not, why not?

Senator BREAUX. I think the quick answer, Senator, is the fact that once they are appointed they cannot be removed unless they are guilty of malfeasance in office. So they know that they can make an independent study of an incident and make a recommendation on why it happened without having any fear that if somebody at the safety agency does not like what they have found that they can be somehow fired or removed or replaced.

They could not be replaced by someone at the agency just because they did not like what they have reported to the agency. So I think that protects their independence.

Senator **Heinz**. I think their protections once they are on the board are excellent. I do not quarrel with that at all. I am really asking about whether it is most appropriate to have the administrator, who, as I understand it, in his sole discretion appoints two of three people to the board, do so.

Now, one alternative would be to have either presidential appointment and Senate confirmation. Another alternative would be to have the administrator continue to recommend them, but to have Senate confirmation. There may be other alternatives.

But I was wondering whether you felt it was important that the administrator be the appointing authority and if so, why. That is really one part of the question. The second part of the question is, is there any reason not to have all three members, irrespective of how appointed, subject to confirmation by the Senate.

Senator **Simpson**. Senator Heinz, I think that what we are trying to do here in this is avoid the politicization of the issue like we get with the National Transportation Safety Board. I think there has been some clear evidence of that.

What we are looking for is a fact-finding, investigative body that will do the job, and we tailored it so that there would be less members so that there would be a similarity to what we are doing with chemical accidents in the recently reported clean air bill.

But we think that we correct that by having the administrator, the deputy administrator and the inspector general all under Senate confirmation. We have got to get the legislature back in the game.

There are four committees that do oversight on nuclear matters in the House, and one, and now two, really, and now three over here. Even though that sometimes makes it tough to do our business, we have tried to blend in here the things you testified to many months ago, the things that Senator Biden testified to, the things that I believe that Senator Roth—there was not a single one who testified before our Subcommittee that we have not tried to recognize.

If there are more things to do, I know, with the cooperation that goes on now between these two Committees and staff, we can present a pretty good piece of legislation.

Senator **Heinz**. So your reason for having the administrator do the appointing is you think that that is the best way to assure professionalism and keep it out of the hands of politicians?

Senator **Simpson**. We look at the EPA. You do not have to agree with Lee Thomas and the people that work for him, but it certainly is a better procedure than whatever is going on right now with the Nuclear Regulatory Commission.

Senator **Heinz**. What about the notion of Senate confirmation? Are you opposed to the Senate confirming the two people?

Senator **Breaux**. I think that the approach, Senator Heinz, and I think Senator Simpson has alluded to it, is if you appoint the administrator, have the President appoint him, and then you have the Senate confirm him and you do the same thing with the deputy administrator and have the Senate confirm him, the Senate has spoken as to the qualifications, the type of individual we want in that position, and the philosophy that he should bring to that board.

Therefore, the idea is that he would continue that philosophy which we have already ruled on in making the appointments to the Safety Board. The Safety Board is protected. They have got a set term, cannot be removed except for malfeasance in office.

The criteria as to how it is to be run are spelled out in legislation. They have a separate line item budget built in so that they cannot be jerked around from a monetary standpoint.

So, you know, we get down to the point of where do you stop Senate confirmation. Do we confirm everybody? Is that not just a waste? Confirm the first person and then by asking him the type of questions as to the type of people he would have on the Safety Board, I think we can have our input.

Senator HEINZ. I do not want to belabor the question. Let me just see if I understand what you said. I understand that you have subjected the administrator, the deputy administrator, and so forth, to confirmation.

What I take away is that you think that that is enough. You are not so much arguing, as I understand your argument, that there is something wrong with confirming these people.

Senator BREAUX. Correct.

Senator HEINZ. You just think it is unnecessary?

Senator BREAUX. I think that is a very accurate reading.

Senator HEINZ. All right, thank you.

Senator SIMPSON. I would say yes, indeed, too.

Senator HEINZ. Mr. Chairman, thank you very much.

Chairman GLENN. Thank you.

Just one comment on the line of questioning that you were on there, Senator Heinz. The Justice Department has indicated—and this is something we want to pursue further—at least tentatively that they have some questions on the constitutionality of having an appointment that could not be removed but for some reason that was not subject to Senate confirmation.

I do not know how valid those concerns are, but we want to follow through.

Senator BREAUX. Probably not very valid.

Chairman GLENN. What? I am sorry.

Senator BREAUX. Probably not very valid.

Chairman GLENN. Well, okay, thank you very much, gentlemen.

Senator SIMPSON. Thank you, Mr. Chairman.

Chairman GLENN. We appreciate your comments.

The next witness is from the General Accounting Office, Mr. J. Dexter Peach, Assistant Comptroller General, and Keith Fultz, Associate Director, and Ms. Mary Ann Kruslicky, Group Director.

Mr. Peach, go ahead with your statement, but in any event your entire statement will be included in the record. If you wish to give the whole statement or an abridged version thereof, that will be fine.

TESTIMONY OF J. DEXTER PEACH, ASSISTANT COMPTROLLER GENERAL, U.S. GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY KEITH FULTZ, ASSOCIATE DIRECTOR, AND MARY ANN KRUSLICKY, GROUP DIRECTOR

Mr. PEACH. Yes, Mr. Chairman, I would like to proceed with an abridged version of my complete statement.[1]

Chairman GLENN. All right.

Mr. PEACH. We tried to provide a full statement to give you the benefit of even more detailed views we had on the legislation, but let me summarize.

Chairman GLENN. Your entire statement will be included.

Mr. PEACH. The structure proposed here, as we see it, basically makes one individual, an administrator, accountable for nuclear regulation, and would provide a system of checks and balances through creating the inspector general and this safety investigations board to ensure that the programmatic, the technical and public health and safety issues are adequately addressed.

In general, Mr. Chairman, we support the move to a single administrator to oversee nuclear regulation and the creation of the inspector general and the Nuclear Reactor Safety Investigations Board.

We do not, however, see the need necessarily for a separate assistant administrator for investigations, and I will describe our reasons in more detail. In addition, we have some specific observations and suggestions regarding the need to provide specific criteria concerning the scope of the authority of the board and leave in place important panels and committees, such as the Advisory Committee on Reactor Safeguards and Atomic Safety and Licensing Board, to provide the administrator expertise and advice on technical issues.

Let me elaborate briefly on each one of those issues. I suppose the first thing I would say is that our position on NRC's organizational structure has evolved over the last several years.

After Three Mile Island when other recommendations were coming out, we concluded in a report that we furnished to the Congress that a commission form with a strong chairman was appropriate for resolving long-term nuclear policy decisions.

But we also said, and still believe, that a single administrator could respond in a more timely and efficient manner to day-to-day regulatory problems and decisions.

If you look over the last eight years, the nuclear regulation environment has changed to one that is more directed in large degree to ensuring the safe day-to-day operation of nuclear power plants.

It is my understanding, for example, if you look at the allocation of the resources of the commission right now, virtually 80 percent is going to issues relating to operating plants and technical safety issues and the resolution of those kinds of areas.

Further, you have this growing public perception that exists among the Congress, the nuclear utility industry and the public that the commission in indecisive, it takes too long to effect change, limits the staff's effectiveness because they can receive directions from at least five individuals, and is too often an industry advocate rather than a regulator.

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[1] See p. 109.

Primarily because of this change in the nuclear regulatory emphasis and the desirability of having one individual accountable for overseeing the operation of nuclear power plants and licensed activities, we believe the time is right to change to an agency headed by a single administrator, pinpointing accountability for effective regulation of nuclear activities and operations.

But we also believe strongly that the systems of checks and balances provided by an inspector general and a Nuclear Reactor Safety Investigations Board must be in place to ensure that the programmatic, technical and public health and safety issues are adequately addressed.

Now, we have supported the need for an inspector general at NRC since 1981, and I think we reiterated that position before your Committee last year when you considered amendments to the Inspector General Act.

The bill here proposes to create two separate offices, an Office of Inspector General and Assistant Administrator for Investigations. From our point of view, we do not necessarily see the need for this separate investigations office.

As we read the proposed legislation, the Office of Investigations would investigate allegations bearing on the integrity of agency proceedings and practices and ensure licensee compliance with rules, regulations and terms of licenses.

However, an Office of Inspector General can investigate allegations bearing on the agency's integrity, such as the recent cases concerning possible collusion between NRC and licensee employees. So some of the investigations you get involved with involve both the NRC and, at the same time, the licensees. Moreover, the agency staff inspects licensees to ensure regulatory compliance.

That leads to our conclusion that these functions of an Assistant Administrator for Investigations could duplicate the work of the inspector general and the agency staff, and we would suggest deleting that section from the bill and making it clear that the inspector general can investigate allegations of wrongdoing by agency employees, contractors and licensees.

In another area, we outlined for you last year when you were looking at the legislation that you have been actively pursuing on the Department of Energy's nuclear facilities five elements to assure independence.

Those elements, independence, technical expertise, ability to determine the scope of work, authority to report findings to the agency, and public access to findings, should also apply to a Nuclear Reactor Safety Investigations Board.

We believe it meets most of the elements as outlined in the legislation. However, we do have some questions as to whether it fully meets those involving independence and ability to determine the scope of work.

For example, the board would consist of three members, including the chairperson appointed by the President and confirmed by the Senate. The administrator would select the other two members.

With the administrator selecting two members, some of the board's independence could be compromised, we believe—this was a result of the dialogue that just occurred with Senator Heinz' question—and to alleviate this concern, we believe the Committee could require that the President appoint all three board members and make them subject to Senate confirmation. Again, that is the process that is followed, as I understand it, with the National Transportation Safety Board.

In addition, when you look at the definition of significant safety event in the proposed bill, while the board would not necessarily be restricted, the definition is broad and does not require the board to more clearly set out the criteria that would define the circumstances under which it would exercise its responsibilities or the mechanism the board would use to identify events that it should investigate.

Rather, it states that prior to the start of the investigation, the board would consult with the administrator and set forth in writing the board's rationale for determining that an event meets the bill's definitions.

We believe that one approach you could use would require the board within a specified period of time after enactment to develop and make available for public review and comment more specific criteria concerning the activities that would prompt an investigation by the board.

Further, because the bill would transfer to the new agency most of NRC's functions, it appears to contemplate that existing panels and committees, such as the Atomic Safety and Licensing Board and Advisory Committee on Reactor Safeguards, would remain in existence.

I believe I heard Senator Breaux say, and Senator Simpson, that this was their intention. But we believe that once it exists, you want to make sure that these panels remain and that they are important enough in a regulatory agency headed by a single administrator to ensure that that administrator will continue to receive a broad range of technical advice. It would be good to have the legislation clearly state that those panels and committees would remain after the transfer of functions occurs.

So to recap briefly, Mr. Chairman, we support the need to place nuclear regulation under a single administrator, and create an inspector general and a safety investigations board. We think those actions would ensure the accountability and the independent oversight system of checks and balances that are needed for the agency and the activities regulated.

We hope that today's comments will be useful to you, Mr. Chairman, as you continue to work through this legislative process.

Chairman GLENN. Thank you, Mr. Peach.

Mr. Fultz?

Mr. FULTZ. I have no comments at this time.

Chairman GLENN. Ms. Kruslicky?

Ms. KRUSLICKY. No comments, Mr. Chairman.

Chairman GLENN. Thank you.

OMB performs a function review, as you have heard us discuss here this morning, for other agencies. Who would perform that kind of review function in the organization that you describe?

Mr. PEACH. As I understand this process, the agency has a fairly specific kind of process that it goes through, regulatory process that was fairly well defined in the information that would carry over.

One of the amendments that was included in the legislation that was reported out of the other committee would provide that whenever they establish a regulation that it would not be subject to that OMB review.

Of course, OMB does make that kind of regulatory review of regulations coming out from other agencies.

Chairman GLENN. Yes.

Mr. PEACH. So it would be up to the regulatory process that is established to assure that you have a well-defined, well-supported regulation that has been subject to public review and comment as it goes through the entire steps and processes.

Chairman GLENN. Okay. You could not foresee the Safety Board, then, being a board that would review proposed rules and regulations, things like that?

Mr. PEACH. Not as it is set out in the legislation. I see it more as a board that is designed to look at specific incidents that occur and investigate those. I think you raised a very legitimate question to look at earlier as to whether it could also consider looking at precursors or concerns or problem areas that they think could be a significant safety problem.

In other words, an accident does not actually have to occur before it could activate the board's interest. There could be other things occurring that they are able to observe that could activate their interest.

Chairman GLENN. Is there any other agency or commission involved with safety and health, that you know of, where the administrator now operates as this would be proposed to operate, completely independent with no review of draft proposed or final rules, regulations?

Mr. PEACH. There is none that I know of or can identify offhand, Mr. Chairman, that has that kind of exemption. Certainly, I have to deal with EPA a good deal in my responsibilities at GAO, and with FAA a good deal, and they are subject to those kinds of reviews, the regulatory review process at OMB.

Chairman GLENN. Yes. I do not know how we work this out. I am a little concerned. In fact, I am considerably concerned that we not just give one person who is not necessarily infallible the kind of authority over this without some sort of review by somebody looking at it from an independent status.

Now, he could go out and get that kind of help, obviously, and use his advisory commission or something else to perform that function, but I think I would feel a little bit better about our whole nuclear posture in the country if there were some sort of review.

We provide that for FDA and for all the other safety and health functions that I mentioned here a little while ago. I read off an alphabet list of them.

Yet, we come to the most important one of all, and we do not have any independent review.

Mr. PEACH. Well, what I was suggesting, Mr. Chairman, is at least in terms of making clear that it would be an expression of the Congress that things like an Advisory Committee on Reactor Safeguards and an Atomic Safety Licensing Board function remains to assure you have that specific kind of process in place and steps you go through in establishing a regulation, which establishes a clear public record of why the decision was arrived at that is put forward.

Then that provides an opportunity for both the public to examine that and for the Congress to examine that and hold that administrator accountable for the kinds of actions he is taking, whether it is well supported or not.

Ms. KRUSLICKY. Mr. Chairman, if I might just say a word in addition to what Mr. Peach has said, the current proposed bill transfers all existing policies and rules and regulations in existence at NRC to the new Nuclear Safety Agency.

One of those policies allows public comments on proposed regulations as they are introduced. That particular portion is not removed by this piece of legislation, so the public would have an opportunity to scrutinize the regulations as they are being proposed by the new agency.

Chairman GLENN. Okay. Over to the political appointments problem, I believe right now NRC does not have any political appointments except the five Commissioners themselves. Is that correct?

Mr. PEACH. That is my understanding, Mr. Chairman.

Chairman GLENN. I think that is correct. How many presidential appointees do you recommend for this agency?

Mr. PEACH. As I understand the bill, it stops at the administrator and the deputy administrator, and I think for this particular type of agency, given the functions it is being given, the area that it is being given to carry out regulatory responsibility, that is appropriate.

I think you are looking for a great deal of careerism, technical expertise in these areas. You are looking for continuity. One of the things that we have found in a lot of our work as we have looked at a number of agencies focusing on management issues is that often there is lack of continuity that occurs at key positions.

Chairman GLENN. Yes.

Mr. PEACH. And I think you would like to see that in this agency.

Chairman GLENN. Did you look at this with any idea of recommending something like a non-presidential term of office, a five-year appointment or a seven-year appointment?

Mr. PEACH. Well, I thought about it while I was preparing for this hearing on this legislation, but I think once you go to a single agency administrator and you have the question of the appointment for a term, then you come to the removal issue.

As you probably know, the General Accounting Office was very involved in that removal issue question over the nature of the appointment of the Comptroller General and then his removal and how that affects his ability to make certain decisions that may be deemed executive in nature.

So I think that, you know, you probably are going to have to deal with maybe looking at a limitation in that area, although I noted with interest the other day—I told you I deal with the FAA, and the presidential commission looking at FAA that has recommended that it be moved outside the Transportation Department and made an independent agency suggested the FAA administrator have a term of office of seven years to provide that continuity that I talked about earlier.

Chairman GLENN. Do you think there should be a cap on the number of non-career SES positions?

Mr. PEACH. I do not have any particular information about that. My understanding is that generally there are limitations of around 25 percent that exist overall in legislation, and I think that right now it is my understanding that a lot of the so-called Schedule C type positions that they have at the agency are ones that are an advisor to the Commissioner kind of positions.

Chairman GLENN. It concerns me a little bit, because at the end of 1987, OPM had allocated 211 SES positions for the NRC; 206 of them were filled, and only two of those 206 positions were non-career SES.

Should we limit the number of Schedule C-equivalent employees at the agency? Have you looked at that?

Mr. PEACH. As I said, I think they have about 23 right now. I think that is a good area to look at it. I do not have any particular number that I could give you in mind, but I think it is, again, an area that you are looking at continuity and expertise in this particular kind of an agency.

It is my understanding also that most of the schedule employees right there, many of them are working in advisor to the Commissioner type of positions, I believe.

Chairman GLENN. At present, OMB does not review proposed agency regulatory policy determinations, including proposed or final rules. Do you believe that the proposed bill would require a change in that situation? Do you think it would come under OMB, or would it be completely independent?

Mr. PEACH. I think it would be completely independent with respect to those rules. That is my understanding of one of the amendments that was proposed out of the Environment and Public Works Committee.

Mr. FULTZ. Amendment one does do that, sir.

Chairman GLENN. Is the NRC's Congressional testimony they give now currently subject to OMB approval?

Mr. PEACH. I do not believe that it is as an independent agency, but amendment one, as I read it, has a specific provision that at least provides that the Congress would be able to receive the original budget presentations, testimony, statements, and other things before they go for OMB review, so that there would be an ability to be able to track and see what, if any, changes may occur as a result of the OMB review.

Chairman GLENN. With regard to the Nuclear Safety Board, your testimony indicates the board should have independence, but that the proposed bill does not provide for this. One suggestion you make is having the President appoint all three board members.

What is your view of establishing the board outside the agency to assure this?

Mr. PEACH. My sense would be that whether inside or outside, the nature of the appointment and the nature of the removal are important driving forces, and also the question of providing for a reasonably separate budget so that there is not undue budget control on their activities.

If that is done adequately within the legislation, even if it is considered to be housed as part of the agency, you would have enough protection.

Chairman **Glenn**. Other safety boards and commissions that I read off a while ago have five members and a five-year term, as opposed to three and three. What is your view of the number of board members and the term for which they should be appointed?

Mr. **Peach**. I think there is a little value judgment in deciding on what you think is appropriate in that area. If I would err on the side of increasing to five either one of those, it would be more the term of appointment, again coming back to selecting those people for their expertise and providing some continuity.

I think having the longer term of appointment could aid in that area. I do not know whether there is any exact magic, whether you have three or five.

Chairman **Glenn**. Yes. We have the other boards, too, with a far greater number of people and a much larger proposed budget than the $5.5 million and 55 FTE limit that is set forth by this proposed legislation. Do you think that is running a little thin?

Mr. **Peach**. Not necessarily. I think it is a reasonable enough number and you could let the board come back and, based on how they can define and see their responsibilities once in place, whether or not that is going to be adequate to meet the task, and can review it on that kind of basis.

The statement was made earlier, and I would also agree—looking at the National Transportation Safety Board as an example, its scope is much larger, given the fact that it can be called upon and is called upon to investigate virtually any type of transportation-related accident, rail, air, general aviation, commercial aviation.

When you are looking at basically 109 operating nuclear plants and one industry, you have a much narrower field, although it is very technical and very complex.

Chairman **Glenn**. Senator Sasser.

Senator **Sasser**. Thank you very much, Mr. Chairman. I apologize for not being here earlier, and I am not going to be able to stay for the entire hearing. I had to chair some hearings in the Military Construction Appropriations Subcommittee this morning.

I have a statement which I would like to submit.

Chairman **Glenn**. It will be included.

Senator **Sasser**. Thank you.

[The opening statement of Senator Sasser follows:]

Opening Statement of Senator Sasser

Mr. Chairman, I want to commend you for holding this hearing today on the reorganization of the Nuclear Regulatory Commission.

The Nuclear Regulatory Commission plays a critical role in protecting this Nation's citizens from nuclear accidents. In addition, it is responsible for regulating an industry that pay a vital role in preserving our energy security and regulating an important component of our medical technology.

Although the Nuclear Regulatory Commission's mission of regulating atomic energy for peaceful purposes has not altered since the agency's inception in 1954, its day-to-day work has undergone a natural progression from that of licensing nuclear power plant design, to licensing construction, and finally to licensing operation. Now, however, the agency is primarily concerned with oversight of operating facilities.

No new nuclear power plants have been ordered in quite some time now. Current market conditions would not indicate an urgent need for more construction in the near future.

Therefore, it is appropriate to review the structure of the agency at this time and correlate that structure to the agency's changing role.

The Committee on Governmental Affairs appreciates this opportunity to examine the Committee on Environment and Public Works proposed reorganization of the Nuclear Regulatory Commission. It is a pleasure to hear from Senators Breaux and Simpson, as well as the other distinguished witnesses here today.

The environment and public works' proposal is an interesting and thought-provoking one. It requires that we weigh the advantages of the accountability of a single administrator, against that of the diversity of views brought to the decision-making process by a collegial body.

Additionally, we must weigh the effect of such a change in reducing the "openness" of the agency's decisions-making process. This "openness" issue is of special concern to the Governmental Affairs Committee, since it was this committee that created the Sunshine Act.

Other considerations of concern to me, as the chairman of the Subcommittee on Government Efficiency, are the government efficiency aspects of a single administrator, and the potential benefits to be derived from separating the roles of policymaker and chief executive officer.

I am personally concerned about the potential for these proposed changes to increase the political control the administration would be able to exert over an ostensibly independent and safety-related body.

The Nuclear Regulatory Commission in clearly making some of the most important safety-related decisions that are made in the country. And this decisions require a very high degree of technical expertise.

I am troubled by the idea that these sorts of delicate decisions could be affected by political forces or slowed down by the review of the Office of Management and Budget.

I look forward to hearing the views of our distinguished witnesses today on these important issues.

Thank you, Mr. Chairman.

Senator SASSER. I have one question on this issue of the reorganization of the Nuclear Regulatory Commission. I am concerned that the Nuclear Regulatory Commission's oversight function, as, for example, reviewing whether or not the Department of Energy made good decisions about nuclear waste disposal would be subject to the judgment of a single presidential appointee, as I understand the proposed reorganization plan.

I am also concerned that any rules or regulations that the Nuclear Regulatory Commission might promulgate, no matter how technical or how urgent, would have to pass muster with OMB. Sometimes you get over there with OMB and things just do not see the light of day again, or if they do, it is in a very different form from how they were originally proposed.

What effect do you think the proposed reorganization to a single administrator and Office of Management and Budget review will have on the Nuclear Regulatory Commission's ability to make a truly independent and timely safety judgment?

You have got an administrator appointed by the President, you have got OMB reviewing the rules and regulations. Will you get a timely ruling? How is that going to affect safety? How about the political influence on the one administrator? How do you respond to all that, Mr. Peach?

Mr. PEACH. First, on the OMB review, as I understand amendment one to the bill that was reported out by the Environment and Public Works Committee, they have something that is unique, as I would see it, to this agency, and that is an exemption for having its regulations subject to OMB review. So they would provide that exemption there to provide greater independence in that area.

The other thing is you have to look at the bill and you have to make your judgment as to whether it provides enough checks and balances to assure that you are going to be getting good regulatory decisions.

In the bill, you provide for the inspector general type of operation so you can investigate any allegations of wrongdoing, licensees or others, where there are problems. You provide for the safety investigations board, and we made some suggestions as to how you could work on improving the criteria for when it would implement action to undertake an investigation.

But you give a capability to look into problems, make recommendations as to whether the things can be improved and the way the agency is operating. And we also suggested that the bill be more explicit about continuing areas like an Advisory Committee on Reactor Safeguards and the Atomic Safety and Licensing Board that could assure that an administrator is going to be getting a variety of very highly qualified and technically competent views in his making his judgments or decisions.

That, together with assuring that there is going to be a good public record established that is subject to review, should put the Congress in a good position, we believe, to hold him accountable for what he is doing.

Senator SASSER. Thank you. Mr. Peach. Thank you, Mr Chairman.

Chairman GLENN. We may have some other questions. I do want to move along. We have the Commissioners here to testify, and I would appreciate it if you could respond to those other questions of other members or staff may be included in the record.

Mr. PEACH. We would be pleased to, Mr. Chairman.

Chairman GLENN. It is a pleasure to work with you. Thank you.

Our next panel is the Nuclear Regulatory Commission members: Mr. Lando Zech, Chairman; Tom Roberts, Commissioner; Fred Bernthal, Commissioner; Ken Rogers, Commissioner. Gentlemen, we welcome you this morning.

Mr. Zech, if you could lead off, we will just take any statements the Commissioners have in that order, Zech, Roberts, Bernthal and Rogers, if that is okay with you gentlemen.

TESTIMONY OF LANDO W. ZECH, JR., CHAIRMAN, NUCLEAR REGULATORY COMMISSION;[1] ACCOMPANIED BY THOMAS M. ROBERTS, FREDERICK M. BERNTHAL,[2] KENNETH C. ROGERS,[3] COMMISSIONERS, AND HUGH L. THOMPSON, JR., DIRECTOR NUCLEAR MATERIALS SAFETY AND SAFEGUARDS OFFICE

Mr. ZECH. Thank you very much, Mr. Chairman.

Mr. Chairman and members of the Committee, my fellow Commissioners and I are pleased to appear before you today to discuss Title I of the Nuclear Regulation and Reform Act of 1988, as ordered reported by the Committee on Environment and Public Works.

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[1] See p. 132 for the Zech's prepared statement.

[2] See p. 142 for Mr. Bernthal's prepared statement.

[3] See p. 145 for Mr. Rogers' prepared statement.

This proposed legislation would replace the Commission with an agency headed by a single administrator, establish an independent Nuclear Reactor Safety Investigations Board within the restructured agency, establish a statutory Inspector General and provide for a statutory Office of Investigations that would report to the single administrator.

With your permission, Mr. Chairman, we will submit for the record our prepared statement which addresses specific aspects of the bill in detail and summarize briefly the Commission majority positions.

Chairman GLENN. Fine. Your entire statement will be included in the record, and that will be the same for anybody else who wishes to do that.

Mr. ZECH. Thank you, sir. Mr. Carr, Mr. Chairman, as I believe you know, is unable to be with us today and has provided a statement which he would like submitted for the record, also.[1]

Chairman GLENN. It will be submitted, too. Thank you.

Mr. ZECH. Thank you, sir.

In recent years, Mr. Chairman, the workload of the NRC has shifted from evaluation of construction permit and operating license applications to the regulation of an operational industry.

In carrying out this role, it is the Commission's view that efficient management of this major regulatory task is increasingly important to maximize the effectiveness of NRC's resources.

A majority of the Commission believes that a single administrator should result in increased responsibility and accountability at the top of the agency, which it believes can assist this agency in meeting its statutory mandate to protect the public health and safety.

Our support for a single administrator is contingent on the restructured agency having the independence to make the necessary public health and safety judgments. Consistent with these views, the majority of the Commission would oppose single administrator legislation if the agency were made part of another Federal agency or had more than three Presidential appointees: the Administrator, the Deputy Administrator, and the Inspector General.

It is also imperative that, as is now the case, the Office of Management and Budget would not review proposed agency regulatory policy determinations, including draft proposed or final rules.

The Commission does not object to the establishment of a Nuclear Safety Board if legislation is enacted creating a restructured regulatory agency headed by a single administrator. However, a majority of the Commission advocates that such a board be part of the single administrator agency rather than established as a separate Federal agency.

Establishment of a Nuclear Safety Board as a separate Federal agency would result in an unnecessary duplication of functions. Of considerable concern is the fact that an independent Nuclear Safety Board has the potential to complicate rather than simplify nuclear regulation by further diffusing accountability and responsibility for the execution of the agency's mission.

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[1] See p. 246.

In our view, the benefits of having the Nuclear Safety Board as part of the regulatory agency outweigh the benefits to be gained by providing it with total independence.

The Commission does not object to a statutory Inspector General as part of legislation reorganizing the Commission into an agency headed by a single administrator. A majority of the Commission recognizes that a statutory Inspector General could work equally well under the Commission form of governance as under a single administrator.

The Commission does not object to legislation which would make the Office of Investigations, OI, a statutory office, providing that the legislation does not diminish the Office's current accountability to the head of the agency.

In this regard, the Commission believes that OI should continue to determine how specific investigations should be conducted. OI must be free to draw its own conclusions based on the information developed in its investigations, and must be able to continue to report possible criminal violations to the Department of Justice.

On the other hand, the Commission must continue to have the authority to set OI's investigative priorities. In order to carry out its public health and safety responsibilities, the Commission must be able to direct OI to conduct an investigation promptly or to suspend an investigation because of a need to devote resources to higher priority items.

The Commission does not believe nuclear safety is jeopardized by the placement of OI under the Executive Director for Operations. We emphasize that the purpose of the Nuclear Regulatory Commission is to ensure the safe use of nuclear energy. Our ability to carry out this mission is not a function of the organizational placement of OI.

Mr. Chairman, I am not going to elaborate on the specifics of the Breaux-Simpson bill. We do have some concerns that I have placed in my prepared statement and that of my colleagues, but I have summarized very briefly the Commission majority position and the concerns that we have.

But at this time before I call on my fellow Commissioners, I would like to give you, Mr. Chairman, just a couple of my personal views and allow my colleagues to do the same.

Chairman GLENN. Fine.

Mr. ZECH. In my view, Mr. Chairman, specifically, the Breaux-Simpson bill, as reported by the Environment and Public Works Committee, is a substantial improvement over earlier versions.

The bill does have several provisions which are of concern to us and which are discussed in more detail in our written testimony and which we believe should be considered. However, having heard Senator Breaux' testimony yesterday before the Udall committee and now today before this Committee, it is my personal opinion that the majority of the Commission today would support the Breaux-Simpson bill. We respectfully wish that the concerns we have would be considered, specifically the one concerning the Executive Director for Operations, and ask that the position not be eliminated as it is in the proposed bill.

Mr. Chairman, that concludes my Commission statement and several of my personal views and I would be happy to answer questions after you have heard from my colleagues who do have statements to make.

Thank you, sir.

Chairman GLENN. Fine. Thank you very much, Mr. Zech.

Mr. ROBERTS. I have no specific comments, Mr. Chairman. I am pretty much in agreement with the Chairman's stated views.

Chairman GLENN. All right, fine.

Mr. Bernthal.

Mr. BERNTHAL. Mr. Chairman, I have in a previous hearing provided a rather detailed record statement on this subject. That was on October 29th, 1987, before Senator Breaux' Subcommittee. My views have not changed since then, but I would like to summarize them briefly and stress some additional points that have become apparent since that time.

I have never believed that there are flaws inherent in the commission form of governance, as it was originally planned and conceived, for regulating a subject that is as controversial as nuclear power. In fact, the need for continuity and stability in the nuclear regulatory process seems to cry out for a commission system.

But I have got to say that the system we now have goes far beyond stability; it is tying us in knots. It does not lead to consensus. Instead, it leads to fragmented and ultimately flawed decisions.

The whole point of collegiality was to promote balanced and well-reasoned decisions based on the hope that five heads of diverse experience and knowledge are better than one. But for a variety of practical reasons, Mr. Chairman, it just no longer works that way.

Realism dictates, it seems to me, that we now seek some practical solutions, and indeed the cumbersome administrative procedures at the NRC are far from the only or even the best arguments for change.

In my judgment, the principle of checks and balances must be reintroduced and accountability has to be restored in order to remedy this situation. A single administrator at the NRC should therefore serve at the pleasure of the President within the Executive Branch, as does the Administrator of the Environmental Protection Agency.

I will strongly oppose any single administrator proposal that does little more than dispose of the distraction of the four additional opinions now present on the Commission. That would leave unresolved what I consider to be the principal difficulty of the commission form of governance, lack of accountability and no effective balance between executive and legislative oversight of the NRC.

In that vein, Mr. Chairman, I would just note the view of the Commission majority that regulations proposed by a single-administrator NRC should not be subject to review by the Office of Management and Budget.

As a Commissioner, I can hardly be unsympathetic to that point of view, but while I think the principle intended is laudatory, in practice I think it is impossible and unwise to attempt so to constrain presidential authority.

The new agency either will be an Executive Branch agency, Mr. Chairman, subject to presidential authority, with an administrator serving at the pleasure of the President, or it will not be. I do not think it is possible to have it both ways.

The Environmental Protection Agency with a similar mission no less vital to public health and safety to that of the NRC has long carried out its responsibilities within the confines of Executive Branch authority.

As for an independent Safety Board, Mr. Chairman, I have always supported the establishment of such a board only in the event that the NRC becomes a single-administrator, Executive Branch agency. But then the board should stand substantially apart from the NRC, in my opinion, and it must have an appropriate threshold specified in statute for initiating its investigations.

I think that time and the record continue to show that we should expect not more than one or two, at the most three events per year that might require such an independent investigation. Should Congress fail to establish a single-administrator NRC, then I would continue to oppose the Safety Board concept because we already have an independent safety board; it is called the Nuclear Regulatory Commission.

Mr. Chairman, there has already been discussion this morning about the fact that the mission of the NRC is changing. We are today an agency preoccupied no longer with engineering and construction, but with the safe operation of nuclear power plants and the safe use and disposal of radioactive materials, a mode which I believe is likely to continue through the remainder of this century.

More and more, as Mr. Peach has noted earlier, the Commission concerns itself not with policy, but with standards, regulatory compliance, enforcement, and management issues. It just seems to me that that kind of responsibility is clearly better suited to a single agency head responsible to the President than to a collegial governing body.

The similarities to our sister Federal agencies should not be overlooked. Let me just conclude by saying quickly that I still believe Congress, because of the similarities between this agency and the Environmental Protection Agency—the common objective to protect the public health, safety and the environment—I believe that Congress may yet one day come to consider the advantages of combining the NRC and the Environmental Protection Agency under a single agency head.

That is hardly a novel idea. A number of European countries have a similar arrangement, Mr. Chairman, and then the risks associated with acid rain, chemical wastes, chloroflurocarbons, global climate change, and the panoply of insults generated by the activities of man should finally, along with the risks of nuclear power generation, come to be treated on a common footing.

That completes my statement, Mr. Chairman.

Chairman GLENN. Thank you.

Mr. Rogers.

Mr. ROGERS. Mr. Chairman, thank you very much.

We appear to have been focusing primarily on two alternatives, an agency directed in both policy and operations by a commission of equal-status members or an agency headed by a single individual vested with both policy and operational authority in all matters.

A third alternative, which is the full implementation and strengthening of the Reorganization Plan Number One of 1980 that has already been referred to this morning, in my opinion, is superior to either of these organizational models.

By formally adopting Plan Number One and by enacting legislation to designate the chairman of the Commission as the chief executive officer of the agency, both the policymaking advantages of a commission and the management efficiencies of a single-administrator organization can be achieved. Such a change would strengthen the present agency and avoid the disruptive consequences of a total reorganization of the agency top management.

My prepared testimony is available for the record. I would like to just try to move through it more quickly and say that I believe that the present situation can be improved, but that it is working.

I would like to elaborate briefly on two principal disadvantages of a single-administrator agency; namely, a lack of diversity of point of view and a lack of public visibility of decisionmaking.

First, a single-administrator agency has to be headed by a strong personality. The subordinates of such individuals tend to be people who are selected for their capacity to carry out decisions effectively, but not necessarily to set policy, and they are unlikely to advance any counter-views on policy matters to those held by their superior.

A diversity of viewpoints on policy matters is most likely to come from a group of individuals who are not subordinate to the administrator and who have had the kind of broad experience that should be required of those who set policy.

These people should be peers, not subordinates of the administrator, and should have had career records of accomplishment that command the respect of each other and of the administrator.

And, secondly, a move from a commission to a single-administrator agency can result in a decrease in visible public accountability. Commissioners' decisionmaking must be carried out in open public meetings with high visibility. Each Commissioner, of course, can be required by Congress to account for his or her decisions, which are all on the public record.

By contrast, decisions made by a single administrator together with his or her subordinates are less immediately visible and are not made before the eyes of the public. While a single administrator can also be called to account by Congress, day-by-day policy and operational decisions are not made in public view and are much less immediately visible. Therefore, a move from commission to single-administrator organization can result in less rather than greater accountability.

A collegial body of highly qualified individuals is a time-honored means to establish sound bases for formulating effective and efficient policies when strong historical experience is lacking, and I believe we are still in that status of lacking strong historical experience in the field of nuclear energy.

In a number of areas, the Commission will be facing new, far-reaching policy issues in the next few years. These are likely to include licensing decisions on waste disposal and related issues, and the regulatory consequences of the development of a future generation of nuclear power plants. For these tasks, the multiple viewpoints of a commission with explicit visibility to the public of their decisionmaking have important advantages.

My most serious concerns regarding a change from commission to single-administrator governance of NRC at this time are that such a change may divert attention from the legislative action needed to improve and streamline nuclear regulatory processes, disrupt regulatory staff's ability to function at its peak, provide an opportunity for those licensees so inclined to go slowly on actions which improve safety but are not yet required, and create a serious leadership vacuum during a prolonged transition period.

I am not opposed to a single-administrator organization, but I am also not persuaded that the expected improvements that have provided the motivation for a governance change will occur by enactment of the Senate bill that we have heard about today. I believe the simpler approach that I have described would be better.

On the matters of a Nuclear Safety Board, an inspector general, and a statutory Office of Investigations, I support these as part of the agency and see no reason why they should not be included directly in either the present commission structure or in the modified commission organization with a chairman designated as CEO that I believe would be best.

I agree with all of Chairman Zech's comments and concerns on these three subjects, and I also support his statements regarding the independence of the Federal agency regulating nuclear energy. It should not be part of another Federal agency. As is now the case, its regulatory decisions, including proposed and final rules, should not be subject to the review by the Office of Management and Budget.

Thank you very much.

Chairman GLENN. Chairman Zech, your testimony indicates that, at the present time, OMB does not review proposed agency regulatory policy determinations, including proposed or final rules.

Do you think this proposed bill would cause a change in that?

Mr. ZECH. No, sir, I do not. I think the proposed bill would retain the ability of the single administrator to handle regulatory matters under his own authority.

Chairman GLENN. I am a little bit concerned, as you know from being in the room during the previous questioning, that we have some means of checking things before they get out.

Now, that is provided by OMB for all the other safety and health agencies we have. They sort of second-guess some of these things before they are put out to the public and public hearings are held.

In effect, if we just let this bill go through the way it is, it would seem to me that in this very important area we would have the administrator putting out the rules and regulations, and that would be it. There would not be the independent review that OMB now provides.

Now, how would this work, or how can we double-check this? I am not sure we want to put that much authority in the sole judge, jury, and executioner of rules, and regulations without some sort of independent review.

Mr. ZECH. Yes. I think, Mr. Chairman, what you are talking about and what I have considered, too, and my colleagues have, too, is the checks and balances that would be involved in this new single administrator.

Chairman GLENN. That is right.

Mr. ZECH. And those are very valid considerations which we, too, have carefully, I believe, reviewed. First of all, under the new proposal the single administrator would simply be required to go by the current rules as far as regulations and rulemaking are concerned.

That means he would have to put out rules for public comment. He would have to publish the rules; they would be in the public domain. I think another thing that perhaps we have not mentioned too much this morning so far is that we do have the Advisory Committee for Reactor Safeguards. In my judgment, that body would perhaps perform an even more important role under a single administrator. It, too, would make, and should make, comments on a broad range of matters, including rulemaking, to the——

Chairman GLENN. Would you put them to work on rulemaking and let them pass on them or give you advice before you published them?

Mr. ZECH. Major rules, Mr. Chairman, they do that now. I would imagine under the proposed organization that they would certainly do that, and perhaps even comment on broader policy issues. They would indeed, in my judgment, be a good check on the single administrator.

I would also envision, Mr. Chairman, that the oversight committees we have in Congress would continue to monitor, review carefully, and make sure that the statutory obligations of the single administrator are met. He must keep the Congress fully informed, as we do now and as we are obliged to now according to the Atomic Energy Act. Those do not change under the new organization.

In my judgment—and it is a good question because one looks to the future to see how this would work—I am confident, Mr. Chairman, that there would be sufficient checks and balances on that single administrator.

I do believe, as you have pointed out earlier, too, and others, that it is important to give the single administrator the amount of independent regulatory authority so he can indeed make decisions without the interference from those who do not have the technical background that he would have available to him.

It is a good question. I think it is one, though, that, in my judgment, I am confident that there would be sufficient checks and balances on the single administrator as proposed in the bill.

Chairman GLENN. Do any of the rest of you have comments on that, Mr. Rogers, Mr. Roberts?

Mr. ROBERTS. No.

Mr. ROGERS. I agree with that.

Chairman GLENN. I am curious, also, if we go this route and we concentrate authority here, then it means that you also concentrate the opportunity to have political influence brought into play more than is possible with a five-member commission.

It is a little difficult to influence a whole football team as opposed to a bowler, for instance. I think you get the analogy. But you have things spread out now a little bit in the collegial approach.

I am curious. In your operations now, do you get calls from governors and from the White House trying to influence your views and your opinions?

Mr. **Zech**. No, sir; no, sir. I can only speak for myself, but I have not received such calls. There has been no attempt on the part of the White House or the governors to call us in any kind of an ex-parte type communication to influence us.

As you recall, when we were considering the emergency planning rule, we did have some of the governors appear before us at the Commission meeting and express their views, but that was in a public forum.

I would say, Mr. Chairman, that frankly one of the things that I have been impressed with since I have been on this Commission is that I have not been influenced or even attempted to be influenced in any kind of an ex-parte type communication, anything to do with contested hearings at all, by the White House or by the governors.

Chairman **Glenn**. Well, I could see that if you are appointed by the President and the President calls and says, we have this little matter up at a certain plant and I hope you will give it due consideration, and you know his interest in this thing—has that ever occurred? Has anybody out of the White House ever tried to do anything like that with regard to a specific plant?

Mr. **Zech**. No, not regarding——

Chairman **Glenn**. Not necessarily the President, but do you get White House calls of concern about a certain area?

Mr. **Roberts**. I have been there the longest. Never. I have never——

Chairman **Glenn**. You have never had a call from the White House?

Mr. **Roberts**. Sir?

Chairman **Glenn**. You have never had a call from the White House about a particular case?

Mr. **Roberts**. No.

Chairman **Glenn**. Okay. Well, I am glad to hear that.

Mr. **Rogers**. None.

Chairman **Glenn**. Go ahead, Mr. Zech. I interrupted you.

Mr. **Zech**. I would just like to say that I really do believe there has been an understanding, certainly a respect for the independence of our agency, Mr. Chairman, and I think that has been rather certainly fully understood by the Executive Branch.

I really do feel that even now, with five of us, it is my judgment that there has been a great respect for the independence of this Regulatory Commission.

Chairman **Glenn**. With regard to the Office of Investigations, the proposed bill gives the OI the right to self-initiate a case, "unless the Administrator determines that the public health and safety requires otherwise specifically with respect to such investigation."

I am not sure I understand exactly where that would be used, and under what circumstances. First off, do you agree with it? In what circumstances would it be useful? Do you think the limitations should be in there or not?

Mr. ZECH. Yes, sir. I think that the essential thing that is meant there, Mr. Chairman, is a matter of priorities. There are some significant safety matters that frankly the staff and the Commission need to determine immediately. There are others that are not as immediate.

All they are trying to say there, I think, Mr. Chairman, is that the agency head is the one responsible for public health and safety. He should be able to set priorities if he believes that public health and safety is involved, and we agree that the legislation should make sure he can do that.

Chairman GLENN. Well, I would hope that you do not have to prioritize different levels of public health and safety issues. On the safety board matter, do you think that the number of staff that would be given it under this bill, if you were the chairman of it, with the limitations of $5.5 million and 55 people—is that enough?

Mr. ZECH. Frankly, Mr. Chairman, it seems to me right offhand that for the work that would be involved it is a rather generous number. I believe that at least from a starting point, it is a reasonable amount and should be reviewed after a period of time. But it does seem reasonable to me and perhaps even more than necessary.

Chairman GLENN. How about the rest of you? Mr. Rogers?

Mr. ROGERS. Well, yes, I agree with that under the assumption that they will only be looking at very significant events, and I believe that is all they really should look at. I think there is the problem of two organizations trying to do the same thing.

After all, the Nuclear Regulatory Commission's day-by-day activities are to watch very carefully within the limit of its resources the operations of all of its licensees. Therefore, I think that if this Safety Board is limited to really looking at just a few very serious situations, I think those resources are entirely adequate.

Chairman GLENN. Mr. Roberts, you had a comment?

Mr. ROBERTS. No.

Chairman GLENN. Okay. The quote I read a little while ago to you, Mr. Zech, where the OI could self-initiate something and then the administrator could, in effect, call it off—you said the agency should prioritize if the occasion required it.

Mr. ZECH. Yes, sir.

Chairman GLENN. But the bill does not exactly say that there has to be a priority between different things. The administrator could call off an investigation on his own without there being a priority between one case and some other case involving a different issue.

Do you think in a situation like that Congress should receive written notice that the administrator has chosen to invoke that provision?

Mr. ZECH. I would not have any problem with that. I do not think, Mr. Chairman, that anything is really meant other than to give the administrator the opportunity to use his authority and carry out his responsibilities.

I certainly feel that the intent is to not necessarily cancel out an investigation. If the investigator thinks an investigation should be done, it should be done. It is simply a matter, in my judgment, of being able to say, if there is an immediate public health and safety matter, that may be one that should be looked at more urgently than one that simply is not an immediate public health and safety matter but just a potential one.

Chairman GLENN. The proposed bill charges the new Assistant Administrator for Investigations with responsibility for investigating intentional violations of the atomic energy statutes, rules, regulations, and orders. Does that mandate differ from the one currently given the OI?

Mr. ZECH. No, not in my judgment. The current mandate given OI is to investigate potential wrongdoing and to determine if there is possible intent, possible willfulness.

Chairman GLENN. It has to be intent?

Mr. ZECH. Sir?

Chairman GLENN. You have to have willful intent, then?

Mr. ZECH. That is what OI really looks at. For example, if the staff believes there is a potential material false statement, OI's primary function, then, is to look into the potential wrongdoing to see whether there is willfulness involved, to look at allegations of wrongdoing and primarily to get the facts.

Chairman GLENN. Do you agree that the proposed safety board should be able to act as a stimulus of regulatory activity by the administrator? Who will then be in a position of reacting to the board's recommendations for regulatory changes?

Mr. ZECH. I think that the Safety Board under the single administrator, certainly, in carrying out its duties of investigations, could indeed provide such recommendations that would be appropriate and would be respected by the administrator.

Chairman GLENN. Would it be more effective to have the board set its own investigation priorities rather than have the administrator setting them, as you suggest in your testimony?

Mr. ZECH. I think under most circumstances, Mr. Chairman, there would not be any conflict at all on this. I just think it is appropriate to point out the fact that the administrator has the ultimate responsibility for the public health and safety, and therefore, he certainly, in my judgment, should be able to say that something was more important than something else.

I think, frankly, the way this would work would involve a very small number of cases and I would honestly see no real problem with communications between the head of the Safety Board and the Administrator.

I think in the small number of cases that they would be discussing this, in my judgment, could be worked out very satisfactorily.

Chairman GLENN. Under the proposed bill, the Safety Board would investigate "significant safety events." This definition includes moderate exposure to or release of radioactivity, major degradation of essential safety-related equipment, or major deficiency in the design, construction and use of or management controls at a licensed facility.

Those are rather general terms. I am curious about what incidents or events in the past four or five years would the board have had jurisdiction to investigate and what incidents or events in the past five years would the board not have had authority to investigate under that. Can you give me some examples so we know how this works?

Mr. Zech. Well, yes. We have looked into this as best we can determine. First of all, Mr. Chairman, let me say I think those words describing and the criteria for investigating events are appropriate.

Frankly, they are rather general; I think they should be. I think there should be judgment involved. I think the head of the Safety Board should be allowed to make a determination as to whether he thinks something should be investigated or not. There is no question about that in my mind. So I think that is appropriate.

Chairman Glenn. Yes, but the board would be limited to those "events", as I understand it.

Mr. Zech. Well, you are limited——

Chairman Glenn. The board would not go outside those. Should the mandate to the safety board be expanded to include some language like this: "or any other incident or event as deemed appropriate by the board?" That gives you a loophole you can drive a truck through to look into anything you want to look at, and I would favor that for the NRC.

Mr. Zech. Well, the criteria do appear to be general. For example, I think NRC after many years of experience has been applying certain criteria for determining abnormal occurrences. Of course, those are the ones that are reportable to Congress.

Our estimate of events that would be investigated by the Safety Board would be somewhere in the vicinity of eight to ten a year, perhaps. Again that is an estimate, but I think it represents a reasonable starting point.

I think we need experience to determine whether that criteria seemed appropriate. We need additional understanding of the events. We are setting up something new. I think it is a good starting point, Mr. Chairman, and I think good common sense and good communications between the agency head and the head of the Nuclear Safety Board and the oversight that Congress provides would be sufficient.

Chairman Glenn. Well, let me put it a different way. Have there been incidents or events in the past five years that you felt you did not have the authority to investigate?

Mr. Zech. No, sir, none.

Chairman Glenn. None at all?

Mr. Zech. None at all.

Chairman Glenn. OK.

Mr. Zech. Let me ask my staff if they have any different response. I am informed that they do not. No. We have all the authority, Mr. Chairman, to investigate whatever we think we should investigate, and it is my judgment that under the new proposed bill that would not change.

Chairman Glenn. The language that I read off a while ago and the one-two-three guidance that is in the proposed bill—the definition of significant safety events is limited to those three. I think I would propose giving you the other one that I read off a moment ago, "any other incident or event as deemed appropriate by the board." There is not any doubt then you have the authority to look into anything you think is important.

Mr. Zech. Well, I think, frankly, what it is sufficient as written, Mr. Chairman, but if necessary, as we gain experience it was found that there would be a need to broaden that role, there would be no reason that would prevent rulemaking action from accomplishing that.

The intent really is to allow investigations of those events that we think now are in the significant area, and if there is any doubt, that would be a judgment call.

Chairman GLENN. This gets into a different area here, but I want to take advantage of having the Commissioners here this morning to ask a question in a little different direction not specifically on organization.

We now have a U.S.-Japan nuclear agreement and it has been approved by the Senate, an action I did not agree with. Prior to this the NRC was able to review the adequacy of safeguards over export of nuclear materials in two steps: one, when the export of uranium was made, and, two, when a request for reprocessing or return of plutonium was made.

Now, under the U.S.-Japan agreement, the second step is eliminated. How will the NRC now judge the adequacy of safeguards on exports to Japan when those exports may be reprocessed years later in a plant which does not even presently exist?

Mr. ZECH. May I call on Mr. Thompson, who is the director of our office of——

Chairman GLENN. I would be happy to have you call on anybody you want.

Mr. ZECH. Yes, sir, thank you very much, Mr. Chairman. Mr. Thompson is the Director of our Nuclear Material Safety and Safeguards Office.

We obviously would not have the same review process aspects that we would under the current arrangement. Nevertheless, we do have agreements and understandings and activities and interfaces with the IAEA which allows, you know, the major organization responsible for the international evaluation for the adequacy of safeguards.

We also conduct the physical security reviews on a periodic basis in various countries. The combination of our reliance on the IAEA and the commitment by the Japanese government to apply the safeguards as best they are able is what we would have to rely on. That was one of the Commission's major——

Chairman GLENN. Depending on IAEA is something, but you are charged in law, I believe, with making an independent evaluation quite apart from IAEA. Is that now going to be possible?

Mr. THOMPSON. Not to the extent that we have been able to do previously. Our reliance would be on the commitments that the Japanese government had made and on the capabilities to develop improvements in their material control and accounting capabilities that are currently being worked on and being developed. It is a promise to do good in the future.

Chairman GLENN. Well, should the NRC establish a standard now that puts a limit on the amount of plutonium unaccounted for, the materials unaccounted for data, in the operation of a plant in the interest of establishing the adequacy of safeguards?

Mr. THOMPSON. May I consult with the General Counsel just for a moment?

Chairman GLENN. Sure.

Mr. **Thompson**. Senator Glenn, you are referring to some of the international facilities as opposed to the U.S. facilities which we do have a benchmark for currently. We would obviously work through the IAEA to establish that benchmark and objective. Those are responsibilities that we work through the State Department and through the IAEA.

Chairman **Glenn**. But who will establish the criteria for the plants in Japan, IAEA in connection with the Japanese? We have no control over that at all now.

Mr. **Thompson**. We obviously give our input into the IAEA. They are the agency that has the responsibility for establishing the overall objectives of making that determination of whether the material had been properly safeguarded in accordance with international obligations.

Chairman **Glenn**. Okay. Where we previously had a right of approval over shipment of plutonium, under the new agreement we are giving up that right for 30 years.

We know there were some shipments previously that did not have adequate protection. For instance, there was a freighter going to Japan through the midwest with plutonium in a deck load with only one guard. We just do not want to see plutonium fall into the wrong hands anywhere, but particularly in that part of the world.

We will have no control over that now, no "yes" or "no" control over that at all under the agreement we have made with Japan as I read it. Is that correct?

Mr. **Thompson**. Senator Glenn, I am advised that we do have the authority to suspend reprocessing and shipment rights under the agreement if we do have major problems which could result in a sigificant increase in the risk of nuclear profileration or in a threat to the national secrurity, With respect to the physical security arrangements, I think our reviews will still be more—I will have to review this. I think that we will still do our physical security review for each shipment.

Chairman **Glenn**. I think we definitely do not, and we do not have prior right of approval over shipment. We have given a 30-year prior approval of shipment now, and so we do not necessarily even know when the shipments will be made, correct?

Mr. **Thompson**. I believe that is correct, Senator.

Chairman **Glenn**. I am very certain it is correct.

[The following information was subsequently submitted by Mr. Thompson:]

The Senator is correct in noting that the United States does not have specific prior rights of approval over shipments under the terms of the Agreement. However, prior to each shipment a transportation plan is to be prepared to document specific arrangements for each shipment (Annex V, "Guidelines for the International Transportation of Recovered Plutonium"). The Guidelines specify that plans are to be established through coordination among the sender, recipient, the carrier and with the cooperation and assistance of the parties (United States and Japan), the transferring government and the countries en route. Additionally, further clarification has been provided in an exchange of letters between Japan and the United States (November 1987) which confirmed cooperation and assistance from the U.S. must be secured prior to each shipment in order to fulfill the requirements of the Guidelines.

The Guidelines have been incorporated in Annex V to the Implementing Agreements. Among other measures, transportation plans would necessarily include measures requiring shipments to be accompanied by armed escorts, trustworthiness determinations for participating individuals, the use of certified shipment casks, reliable communications systems to support shipments, isolation of aircraft at airports, and detailed contingency plans in advance of shipments. Transportation is also to be carried out be dedicated cargo aircraft.

Mr. ZECH. Mr. Chairman, if I may, I know you are aware of the position NRC took on that agreement at the time.

Chairman GLENN. Yes.

Mr. ZECH. Now, as I understand it, it is law. We are going to carry out the law to the best of our ability.

Chairman GLENN. Well, we all have to.

Mr. ZECH. Yes, sir.

Chairman GLENN. That is what we have to do, and I have to do the same thing here, but I disagree strongly with it. We were on the same side on that one. You disagreed with the thing. You thought it let up on the restrictions too much, and I did, too. That is the reason I fought it hard on the floor, and I lost.

I will say this. I do not think the issue was fully understood on the floor. There were some misrepresentations made about it that I think carried a lot of weight with a lot of members when the vote occurred.

So, we lost that one on the floor, and I think it was a very major loss. I mentioned earlier about the administration's efforts to open things up internationally and treat nuclear matters just as any old normal business operation out there.

We chose a government-to-government approach early on and this is one last-gasp effort to change the whole policy that we have had since the beginning of the nuclear age, and I think it is just wrong. I think when you start trans-shipping plutonium around the world in these lots like this without as much control as we had previously, and we are letting down the bars on that, I think that is a step in absolutely the wrong direction.

I know you agreed with that, because you, as Commissioners, made statements and agreed with that position early on. But I just wanted to take the opportunity this morning to bring that up.

Any last words you would have for us, anything that I should have had sense enough to ask a question on and did not that you would like to get on the record here this morning?

Mr. ZECH. Thank you, Mr. Chairman.

Chairman GLENN. That is an open door, if I ever gave you one. [Laughter.]

Mr. ZECH. Let me accept that very kind invitation to just make a brief comment. First of all, you have heard from the Commission this morning, Mr. Chairman, and we have given this a great deal of thought.

I think if I could summarize the Commission position, as you have heard this morning, there are three of us who have favored the single administrator and two who do not object, essentially. On this Commission, Mr. Chairman, I have found that is sometimes about as good as I can do to get unanimity. We have got a three-to-two, with the two not objecting.

We have presented some concerns and some thoughts this morning, Mr. Chairman, but I would just like to very briefly say this. I would frankly like to commend Senator Breaux and Senator Simpson for their efforts to improve our agency. I would also like to commend Chairman Udall. He had a hearing yesterday to carefully review this very important matter.

Mr. Chairman, I would like to commend you for your interest and your efforts at this hearing and in times past and in the future. I know that you are going to be watching this very carefully and I think it is a very responsible action to be taking. It is a very important action.

I would also frankly like to, with your indulgence, Mr. Chairman, commend my fellow Commissioners for looking at this so carefully. We do feel that the Commission is functioning in a very good manner. We simply think it could function a lot better.

We are frustrated, as you can tell, and we want to do a better job. We are before you, Mr. Chairman, in a sense recommending that our jobs be eliminated. Now, I do not think many commissions in our country are doing that.

We have thought about it very carefully. We really do believe that this will better serve the interests of the American people. We are not doing this without very, very careful review of our responsibilities.

I think it indicates a willingness on the Commission's part to place the service of the American people at the very top priority, which it should be. We are doing our best to serve the American people. We only want to improve the situation. We want to bring the benefits of nuclear power to the American people in a safe manner so that public health and safety will be protected.

And if I could just conclude, Mr. Chairman, to agree with you in your opening statement, I believe, where I would say we share your goal, and I think I could quote where you say "we all share the same goals for efficiency and accountability in our Government and for the safe operation of nuclear power."

We share that view. That is why we, Mr. Chairman, support the positions we have taken here in this important matter, and I thank you very much for allowing me this opportunity.

Chairman GLENN. Thank you very much. I appreciate your statement, I appreciate your being here, and I hope if we do have questions from other Senators or staff to be included in the record, you could respond to those as fast as possible so we could get those included in the record.

Thank you very much for being here, gentlemen.

Mr. ZECH. Thank you very much, Mr. Chairman.

Chairman GLENN. The hearing will stand in recess subject to the call of the Chairman.

[Whereupon, at 12:20 p.m., the Committee was adjourned to reconvene at the call of the Chair.]

RESTRUCTURING OF THE NUCLEAR REGULATORY COMMISSION

THURSDAY, MAY 12, 1988

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:30 a.m., in room SD-342, Dirksen Senate Office Building, Hon. John Glenn, Chairman of the Committee, presiding.

Present: Senators Glenn and Trible.

OPENING STATEMENT OF CHAIRMAN GLENN

Chairman GLENN. This hearing will be in order. Today we continue the Committee's review of a proposal to change the management structure of the Nuclear Regulatory Commission (NRC) from a five member commission to an agency run by a single administrator. As I indicated at our first hearing last month, there are a number of competing public policy concerns that should be satisfactorily resolved before acting on this proposal.

On the one hand, the move to a single administrator may increase the efficiency of the agency's decision-making process and provide a better opportunity to seek accountability for the agency's performance. Those are the desired features in every agency in the Executive Branch, including the regulatory agencies concerned with public health and safety. In fact, of all the regulatory agencies concerned with health and safety, such as the Food and Drug Administration, the Federal Aviation Administration, and the Environmental Protection Agency, the NRC is the only one not headed by a single administrator.

On the other hand, none of the aforementioned agencies, except the NRC, have independent status and responsibilities in law to report both to Congress and the Executive Branch. That is a little unusual. If the NRC continues to have that status, but is to be headed by a single person, then the potential for abuse of power rises significantly. The vesting of policy making authority in one individual, rather than five commissioners, may make the regulatory climate more susceptible to unpredictable changes in direction. This possibility is compounded by the fact that under the proposal being considered by the Committee, regulations promulgated by the administrator would not be, I repeat, would not be subject to review by the Office of Management and Budget (OMB). Nor would OMB review in advance the administrator's testimony before Congress on legislative and budget proposals.

So, without a check from OMB and from an independent nuclear safety board, it appears that the only restraint on the administrator's policy-making is the power of the President to remove the administrator.

In my view, if legislation to restructure the NRC included measures to provide for some real checks on the administrator's authority to singularly set national policy on the licensing and operation of nuclear reactors, and the uses of nuclear materials, then the case for a single administrator, of course, becomes much stronger.

I look forward to working with my colleagues on this Committee and the Environment and Public Works Committee which originated this legislation. Do you have an opening statement, Senator Trible?

Senator TRIBLE. I have no opening statement, Mr. Chairman, thank you.

Chairman GLENN. All right. Thank you.

Before we continue, I have a statement for the record from Senator Sasser who was unable to be here today.

[Senator Sasser's opening statement follows:]

OPENING STATEMENT OF SENATOR SASSER

Mr. Chairman, I want to commend you for holding this second hearing on the reorganization of the Nuclear Regulatory Commission.

I share your view that the Nuclear Regulatory Commission plays an important role in protecting the citizens of this country by insuring the safety of our nuclear plants.

Although the Nuclear Regulatory Commission's mission of regulating atomic energy for peaceful purposes has not changed since the agency's inception in 1954, its day-to-day work has changed drastically from licensing nuclear power plant design, to licensing construction, and finally to licensing operation. Today, the agency is primarily concerned with oversight of operating facilities.

Therefore, I think this is a particularly good time to review the structure of the agency, relate that structure to the agency's changing role, and make whatever midcourse corrections are necessary.

The environment and publc works proposal is an interesting and thought-provoking one. It requires that we weigh the advantages of the accountability of a single Administrator, against that of the diversity of views brought to the decision-making process by a collegial body. In addition, we must evaluate the proposal for a nuclear safety board, and other organizational changes.

We must weigh the effect of these changes in reducing the "openness" of the agency's decision-making process. The "openness" issue and the issue of how best to organize the executive branch are of special concern to the Governmental Affairs Committee, since these are areas of our traditional jurisdiction.

As the Chairman of the Subcommittee on Government Efficiency, I am especially interested in testimony on the government efficiency aspects of a single administrator, and the potential benefits to be derived from separating the roles of policymaker and chief executive officer.

I am concerned, however, that these proposed changes could permit a counter-productive increase in the political control the administration wields over an agency that needs to be independent.

The Nuclear Regulatory Commission is charged with making some of the most important safety-related decisions in this country, decisions which require a very high degree of technical expertise. I believe that it is important that these sorts of decisions be insulated from unnecessary political forces and not be unduly delayed by Office of Management and Budget Review.

I know the committee looks forward to hearing the views of our distinguished witnesses today on these important issues.

Chairman GLENN. We have two panels this morning. We have on our witness list this morning, the Honorable Joseph R. Wright, Jr., Deputy Director of the Office of Management and Budget, and Ben

Hayes, Director of Office of Investigations, Nuclear Regulatory Commission. We have a panel of former Nuclear Regulatory Commissioners, including Mr. Asselstine, Mr. Bradford, Mr. Gilinsky and Mr. Rowden. Our final panel includes Eleanor Weiss, General Counsel, Union of Concerned Scientists, and Edward Davis, President of the American Nuclear Energy Council.

Our first witness, Mr. Wright. If you will come to the table please, we can proceed.

TESTIMONY OF JOSEPH R. WRIGHT, DEPUTY DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

Mr. WRIGHT. Thank you, Mr. Chairman. It is always good to be before our Oversight Committee again. This morning I would like to submit my prepared testimony for the record, if I may.[1]

Chairman GLENN. I would say to all of our witnesses this morning that we welcome abridged versions of testimony in the interest of getting the most question and discussion time that we can. The entire statements of each witness will be included in the record and an abridged oral version is fine.

Mr. WRIGHT. Thank you very much. I would very simply say, and in the interest of time, that from what I have heard, something clearly needs to be done, Mr. Chairman. We would support the changes that have been proposed for the most part, including changing the Commission into an agency that is headed by a single administrator, and creating a Nuclear Safety Reactor Board that would be part of the new agency. We would recommend strongly that the administrator be appointed by the President and serve at the pleasure of the President. But we would also strongly recommend against what we call a hybrid agency, that which is what seems to be proposed at the present time, with legislative/regulatory bypass authority. That is, if the new agency is going to be a part of the Executive Branch and be the responsibility of the Executive Branch, then it should not have bypass authority so that the Executive Branch, including the Executive Office of the President, cannot work with this agency in order to accomplish its mission.

We would strongly recommend that the new agency be a part of the Executive Branch in every sense of the word, including the legal responsibility. Beyond that I think the changes that are suggested for the most part will be very helpful in allowing this agency to do its job in a much more efficient manner. Mr. Chairman, I would be happy to take whatever questions.

Chairman GLENN. Thank you, Mr. Wright. I think part of what you said I would agree with, but part I probably would not agree with, at least at this stage. When you say the NRC is part of the Executive Branch, it seems NRC is currently set up it is part of the Executive Branch for administration only. But, the current NRC has responsibilities to report in both directions, to the Executive Branch and to the Congress. That is the difficulty. Too often we think of the NRC as just being another agency over in the Executive Branch someplace.

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[1] See p. 150.

The only reason that it is in the Executive Branch is to administer the place: to furnish an office space to write the paychecks, and things of that nature. NRC responsibilities run directly to the Congress as well as the Executive Branch. To say that the proposed successor agency should just be considered another Executive Branch agency would require a different or amended proposal from the one we have here. That may be what the administration would like, but that is not what current law or the Environment and Public Works Committee draft provides.

This proposal legislation would take away the NRC's independent status. That is the reason I stressed in my opening statement that the current NRC is an independent agency. It was deliberately created that way based upon some of the AEC experiences. The NRC has responsibilities to the Congress and the Executive Branch. The NRC is in the Executive Branch of Government, but they are there for administrative purposes only.

Mr. WRIGHT. Mr. Chairman, if I might, I would just like to, with all due respect, question the statement of the Chairman on that issue. I do not believe in law that there is a legislative bypass, at the present time, with the existing agency.

In other words, I believe that the existing agency does not have what we call a legislative bypass to where it is excludes the Executive Office of the President from reviewing budgets and testimony and everything else.

Chairman GLENN. I may want staff to look into this and later in the hearing we can comment on this again.

Mr. WRIGHT. I think it is a point in question right now that we ought to look at because we may be going on ahead and making it more independent than it is at the present time.

Chairman GLENN. I am told by staff that right now under current law the Commission does not have to submit its testimony to you prior to coming up to Congress. The administration does not technically administer the policies of the Nuclear Regulatory Commission.

Mr. WRIGHT. Could we submit our position in writing, after looking at the law? [1] Not to complicate the issue, Mr. Chairman, because we could work this out without lawyers probably a lot better anyway.

Chairman GLENN. Being a nonlawyer, I very much agree. [Laughter.]

Mr. WRIGHT. Yes, I know. Anyway, we would like to submit a position on that if we may.

Chairman GLENN. All right.

Mr. WRIGHT. I might mention, Mr. Chairman, just very briefly some agencies that do not have by pass authority and are within the total responsibility of the Executive Branch. These agencies have similar types of regulatory responsibilities. And I think it is working reasonably well. EPA, OSHA, FDA in Agriculture, Energy, and the NRC in the area of Nuclear Waste Disposal. We have a lot of these organizational, animals out there that are part of the Executive Branch that also have, and I would like to say from the Office of Management and Budget standpoint, the benefit of the oversight and the coordination that the Executive Office can provide in working on a lot of these issues.

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[1] See p. 159.

Chairman GLENN. But those are not independent agencies. They are not designated as independent agencies. They are set up differently under law. They are a different breed of cat. For example, EPA is fully within the Executive Branch of the Government. EPA testimony is to be cleared by OMB, and you have full control over its content. NRC is different in that respect.

Have you run out a cost estimate of this bill?

Mr. WRIGHT. I do not think there is going to be any cost difference from an FTE or a full time equivalent personnel basis or a dollar basis, one way or the other, Mr. Chairman. The agency right now, I understand, has about 3,180 people in them. We had requested $450 million for fiscal 1989. I cannot imagine that if this bill is passed we would change that. I do not believe that Congress will provide that much anyway.

Chairman GLENN. Good. I did not anticipate any material or substantive changes in cost either. How about the name? GAO suggested that the new agency should not be named the Nuclear Safety Agency because that means it is going to be called NSA. That could confuse it with the National Security Agency.

Mr. WRIGHT. I do not have any particular feelings about that one way or the other, Mr. Chairman. I would defer to the Committee on that.

Chairman GLENN. If the proposed legislation were enacted, is it correct that the new agency would no longer be an independent regulatory agency because the administrator would serve at the pleasure of the President?

Mr. WRIGHT. I think the way it is set up right now, unfortunately, Mr. Chairman, you have got like I said a hybrid. You have got part fish, part fowl on this. I would not call it, the way it is set up right now, a fully independent agency because of the fact that the administrator comes in at the pleasure of the President and can be fired. But then beyond that it has all of the other characteristics of an independent agency. I would say it ought to go one way or the other. It should not be right in the middle.

Chairman GLENN. OMB now performs a regulatory review function for all health and safety agencies headed by a single administrator. This bill would exempt the Nuclear Safety Agency from this process. Should the health and safety agencies all be exempted from OMB review?

Mr. WRIGHT. No. We feel very strongly, Mr. Chairman, that they should not be. We think that the regulatory review is a very useful process. Not only from the standpoint of the Executive Branch and the Congress, but also from the standpoint of the public, because remember, every year we put out, in advance, the regulatory plans for the upcoming year, which we think is a very useful process of communicating what the Executive Branch is intending. If we do not have the oversight responsibility we cannot provide that announcement to the public.

Second, as a regulatory review process, it is very useful for coordinating with other agencies. I think these issues are so complex and they are so important that there should be coordination. I think it is not in the best interest of the public to have these excluded from the regulatory review process.

Chairman GLENN. The need for coordinated operations is one issue that concerns me, I must admit. We may want to keep the NRC independent so they can give their recommendations without fear of political maneuvering in the Government. But, the other health and safety agencies you talk about are all headed by a single administrator. We have FDA, EPA, OSHA, FAA, Food and Safety Inspection Service, Mine Safety and Health Administration, Occupational Safety and Health Administration, all of which deal with health and safety which we are mainly concerned about here. Do you think the Nuclear Reactor Safety Board can be helpful in the regulatory review function for the new agency by providing the administrator with advisory comments?

Mr. WRIGHT. Yes, sir, I do.

Chairman GLENN. How would that change their proposed statutory operation? Would it change it substantially?

Mr. WRIGHT. Not if they are just providing an advisory service. I do not think it should.

Chairman GLENN. Under the proposed bill, OMB would not review in advance the administrator's congressional testimony, legislative recommendations, comments on legislation, and budget requests. I gather you do not feel that the nuclear power issues justify that kind of independent treatment?

Mr. WRIGHT. No sir. It just so happens that the Office of Management and Budget is the agency that provides this coordination amongst all the agencies. I believe that is a very useful process because if you exempt any agency from that process, you are assuming that they are the font of all knowledge within that particular area and that no other agency within the entire Executive Branch can offer any substantive comments, or advice, or constructive criticism or changes. I believe that is a big load to put on a single agency and it is not giving them the total useful input from the rest of the Executive Branch. So no, I do not believe they should be exempt.

Chairman GLENN. Do you have any feelings on how independent the Nuclear Reactor Safety Board should be? The analogy I am thinking of here is the National Transportation Safety Board. The NTSB operates in a completely independent fashion from FAA and makes recommendations to FAA. But they are not directly controlled by it in their findings and what their recommendations are. They are independent in order to provide a double check. It is similar to obtaining a second doctor's opinion when things go wrong, or trying to foresee problems before they occur. The authors of this legislation apparently contemplated a similar independent function for the Nuclear Reactor Safety Board. Do you have any comments on that?

Mr. WRIGHT. Yes, Mr. Chairman. I would say not strong comments on it. It would be our preference that the board be placed within the agency and report to the administrator. We believe that they can fulfill their function very well by being within that organizational structure. Also, it would help where the administrator could also direct them toward certain priorities and make sure that they are responsible in getting their investigations done in a timely fashion and all the other advantages that you would have being within the organization. I do not believe that their independence would suffer dramatically if they were part of the agency. I would say I show a slight preference of it being within the agency itself and reporting to the administrator.

Chairman GLENN. If we pass this legislation and put it into effect, we would be reducing the number of Presidential appointees to the NRC. The proposed bill would include only four Presidential appointees for the new agency: the administrator, the deputy, the Inspector General and the Chairman of the Safety Board. At present, of course, the NRC has five Presidential appointees, the five Commissioners. Do you see any change in operation because of reduced Presidential authority over the new agency from the number of appointees?

Mr. WRIGHT. No, sir, I really do not. I think that what you are doing with the bill in total is that you are coming up with a good management improvement. I do not believe that the reduction of the number of presidential appointees would affect it one way or the other?

Chairman GLENN. One of the things I have been concerned about is keeping the agency career-oriented. This is not an agency where you can float people in and out like a big floating crap game and expect to have a good operation into the future. It is too technical to do that.

Mr. WRIGHT. I would agree with that, Mr. Chairman.

Chairman GLENN. It is very, very technically oriented. Today, for example, we have 210 senior executive service (SES) positions filled at the NRC and only two are non-career SES out of that 210. And in the VA bill, the Veterans Administration bill that we just finished working on, we legislated caps on the numbers of the so-called "political positions" that the new department could have. Would you think such a cap would be a good thing to do in this Nuclear Safety Agency?

Mr. WRIGHT. I do not have a problem with that, Mr. Chairman. I believe that, right now the agency, that is a fairly high number, is it not?

Chairman GLENN. I am sorry?

Mr. WRIGHT. The SES number is fairly high in this agency compared to other similar agencies.

Chairman GLENN. Yes.

Mr. WRIGHT. I believe that if you are going to be setting up the structure on it, there is nothing wrong with establishing a cap like what you are talking about. The only thing I would say is that I would provide some flexibility for change. Sometimes I am concerned when legislation comes out and it sets very rigid standards where future administrators, whatever the time period is, 5 years, 10 years, that have no flexibility at all. For example, we have that many cases in the Veterans Administration even now within the existing legislation. And so I would just say that while I think the SES number is a little bit high, and I have no problem with setting up general caps on it, I would suggest not being too rigid, just give future administrators some room.

Chairman GLENN. Do you have a figure you would suggest to us as a limit on that?

Mr. WRIGHT. I would like to get back to you, Mr. Chairman. I do not have that right now.[1]

Chairman GLENN. All right. We had one suggestion. Commissioner Bernthal, I believe, recommended that the functions of the EPA and NRC should be consolidated into one agency. Do you have any views on that?

Mr. WRIGHT. I am sorry, Mr. Chairman.

Chairman GLENN. Yes. Commissioner Bernthal has recommended that the functions of the EPA, Environmental Protection Agency and NRC should be consolidated into one agency. Do you have a view on that?

Mr. WRIGHT. I do not right now, but I can get a careful review of it. I have not reviewed that one and I think I would like a little time.

Chairman GLENN. It is not part of this legislation.

Mr. WRIGHT. Yes.

Chairman GLENN. But if we were going to make major changes in the organization, obviously, any considerations like this should be made at the same time.

Mr. WRIGHT. Do you want us to get back to you with a position on that, Mr. Chairman?

Chairman GLENN. We would appreciate a comment on that, yes.

Mr. WRIGHT. Be glad to.[1]

Chairman GLENN. Thank you. We have been concerned about certain aspects of the move to a single administrator and still keep the independence of the agency, which I think we would probably like to do. We are concerned that with this kind of authority and power going into one person's hands, there is no check on that. This is such an important area. We need some check on it. If it is not to be OMB, and if we go to a single administrator, what mechanism would you suggest to put a check on the actions of an administrator who might be tilting on behalf of industry with a lax regulation, or on the other hand, over-regulation? Would the independent outside safety board, as we have envisioned here, do it or should there be some other mechanism?

Mr. WRIGHT. I agree that there should be some check.

Chairman GLENN. Yes.

Mr. WRIGHT. I agree with that. Our position very strongly is that the new agency should be within the Executive Branch and we ought to use the established mechanism that we have in place and that would work very well. Also, there is quite a bit of congressional oversight on all of these agencies, which I think is very useful. Beyond that, if you say let us not use the mechanism that we have in place, which for the most part, I think, is working reasonably well, I suppose you could set up a whole new structure that is involved in only this area, like an outside board. But I would not recommend that. I think what you are trying to do is solve a problem, which I agree could exist, on over regulation or whatever it is. But you are trying to solve it around the current system, so we would recommend against that.

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[1] See p. 159.

Chairman GLENN. This whole area that we are talking about is what disturbs or concerns me most about this proposal. I am not quite sure how we should set it up. I know we need some independent group there to monitor what a single administrator would do. Some might say congressional oversight should be able to take care of this. I wish I had that same kind of faith in Congressional oversight.

Mr. WRIGHT. No, sir, Congressional oversight alone would not be sufficient.

Chairman GLENN. I agree that in an ideal world and under our constitutional systems of checks and balances, that is one of our functions here. But I am also a pragmatist and a realist and know that a lot of times we get so bound up in appropriations bills on the floor. We all have so many things that we put off our oversight functions and we do not get around to them as often as we should. I think that is the difficulty with relying on it. I would feel more comfortable, I guess, with some sort of independent group that was going to oversee the actions in this very important area.

On the other hand, it is a little bit hard sometimes to just say we will just toss this to the administration and trust that it will be administered without fear or favor, and purely in the interest of safety. Because we already know that sometimes politics does get mixed up in some decisions, unfortunately. That is what you try to guard against in a situation like this. That is where we stand with it and that is what the Committee is wrestling with.

Mr. WRIGHT. No, I understand that, Mr. Chairman. I did not mean Congressional oversight by itself. I meant the combination of the Executive Branch within the OMB oversight and Congressional. The two of them combined.

Chairman GLENN. Yes. When you get into very, very technical areas like this, we do not have the technical expertise here to do a day-in/day-out monitoring job that has to be done with an agency like this. I wish we were all that smart, but we are not. We do not have the technical expertise, nor the background to do that.

Mr. WRIGHT. No, sir, we do not either, necessarily, but we know where to get it, particularly in the other agencies that have similar regulatory or oversight responsibilities. That is one of the benefits that we have got through, if you want to call it, a clearing mechanism. We can bring the technical expertise to it.

Chairman GLENN. Just one last question. Who do you believe should appoint the Board members? If we set up a Nuclear Safety Board, who should appoint those members? Should they be appointed by the administrator himself or by the President?

Mr. WRIGHT. I think that should be by the President, Mr. Chairman.

Chairman GLENN. Okay. That would get us a little bit or at least one more step removed from setting up a buddy, buddy agency or something like that.

Mr. WRIGHT. Yes.

Chairman GLENN. At least it looks that way.

Mr. WRIGHT. I think that is important enough to where those should be Presidential appointees.

Chairman GLENN. Yes. Okay, good. Thank you. We may want to get back to you with some other questions and we hope you could respond to those so they could be included in the record also. We appreciate your being here this morning.

Mr. WRIGHT. We will be happy to, Mr. Chairman, nice to see you again.

Chairman GLENN. Thank you.

Our next witness is Ben Hayes, Director, Office of Investigations of the Nuclear Regulatory Commission. Ben, glad to have you back with us.

TESTIMONY OF BEN B. HAYES, DIRECTOR, OFFICE OF INVESTIGATIONS, NUCLEAR REGULATORY COMMISSION,[1] ACCOMPANIED BY WILLIAM WARD, ASSISTANT DIRECTOR, OFFICE OF INVESTIGATIONS

Mr. HAYES. Thank you, Senator.

Chairman GLENN. We welcome your testimony either in its entirety or an abridged form. In either event, it will be included in the record in it's entirety.

Mr. HAYES. Thank you again, Senator.

Chairman GLENN. You have someone with you. Would you introduce your associate?

Mr. HAYES. Mr. Bill Ward, the Assistant that I work with.

Senator, I have been the Director of the Office of Investigations approximately 5½ years. Since I appeared before you last April, OI has been transferred under the Office of the Executive Director for Operations. I now report not directly to the Commission, as previously, but to the Deputy Executive Director for Operations. In my view, the Office of Investigations has even less independence and authority than it did a year ago.

In my testimony today, I will discuss why I believe this to be the case. I will also mention some additional authorities and/or organizational changes which could enhance OI's effectiveness. First, however, I will provide my views concerning the impact on the operations and functions of the Office of Investigations of the Nuclear Safety Agency legislation proposed by Senators Breaux and Simpson.

Subtitle C of the Breaux-Simpson bill would establish an Office of Investigations to be headed by an Assistant Administrator for Investigations. This is an appropriate reporting level for OI in the new agency. Moreover, the investigative jurisdiction described for OI, the authorities given its Director, and the requirements for Agency employees to report wrongdoing to OI would improve the authority and independence of the investigative function considerably.

On the other hand, I disagree with the provision that would allow the administrator to prevent the initiation of a investigation if "public health and safety requires otherwise." I cannot recall a single investigative matter in over five years as Director, OI, where the investigation could have impacted adversely on public health and safety. At the same time, the term "safety" is all too frequently evoked at the NRC without a clear definition of what it really means. For example, it is often used in opposition to wrongdoing, as if wrongdoing, as defined by the NRC, did not always involve safety. Without a clear understanding of what safety is, for instance, does it mean and does it include character and integrity matters of individuals, legitimate investigations could be stifled for unsound reasons.

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[1] See p. 162 for Mr. Hayes' prepared statement.

There also is a possible overlap of functions between OI and the Nuclear Reactor Safety Investigations Board. It is not clear whether a Board investigation could take precedence over an OI investigation. If so, it could cause a delay that could affect chances of criminal or civil prosecution or willful violations that may have caused the accident. Moreover, the proposed prohibition on the use of Board findings in lawsuits raises the possibility that Board evidence may not be available to us to be used in civil or criminal prosecutions. This needs to be clarified.

My last comment regarding the bill is the inclusion of the requirement for a memorandum of understanding with the Department of Justice within 90 days. I do not believe an arbitrary time limit on interagency negotiations is the best way to ensure that a workable and effective agreement is reached.

In sum, I believe that the langauge of this bill would improve the independence and authority of the investigative function considerably over its current situation. That is not to say that there are not additional investigative authorities that could be added to the legislation which would further enhance the investigative function.

The Office of Investigations needs express, criminal investigative authority to investigate violations of statutes or regulations otherwise within the civil jurisdiction of the NRC. This authority not only would provide OI with some important investigative tools, it would remove some of the ambiguity that attends our current investigations. Virtually, every case of wrongdoing that OI investigates involves potentially criminal, as well as civil violations. The Department of Justice has recommended that criminal investigative authority be given OI on at least two occasions, most recently in the Department's March 21, 1988, comments on the Breaux-Simpson bill.

The Director, OI, also needs the authority to appoint, supervise, and direct all subordinate employees. Although statutory inspectors general have such authority, the Director, OI, does not. Such authority would help assure the independence of OI by providing protection against the arbitrary reassignment of personnel to and from OI. Clearly, neither OI, nor any other investigative organization can be considered truly independent if persons other than the Director control personnel actions regarding that unit.

In sum, the addition of these authorities, plus those already found in the bill, would allow this office to carry out its functions with competence and integrity. It is especially important that these authorities be conferred legislatively. Absent legislation, they would be subject to reconsideration every time the composition of the Commission changes. The investigative function must be insulated from the political process, be it external or internal. I believe the importance of the NRC's investigative program to the protection of public health and safety warrants nothing less than this.

I noted earlier that the transfer of OI under the office of the Deputy Executive Director for Operations has resulted in less independence and authority for OI. Let me expand a bit.

Like any investigative organization, the Office of Investigations must have both the appearance and reality of sufficient organizational independence in order to be able to conduct thorough and objective investigations. The only effective way to achieve this in NRC is to have the Director of the Office of Investigations report directly to the Commission—as was the case for the first 5½ years of OI's existence.

A document entitled "Quality Standards for Investigations" issued by the President's Council on Integrity and Efficiency is especially relevant to this issue. It discusses, among other things, the need for investigative organizations to be, "* * * free, both in fact and appearance, from impairments to independence * * *." It also notes, "The investigative organization should report to the head or deputy head of Government authority to refer investigations to an appropriate prosecutive authorities and top management without fear of censure."

Having OI report to the EDO, or in this case, the Deputy EDO, neither of whom is the head or deputy agency head, erodes both the fact and appearance of independence. Moreover, it creates some inherent conflicts.

The authorities and responsibilities previously given OI are supposed to remain unaffected by our placement under staff. This is fine in theory, but not so fine in practice. Those authorities were given to the Director, OI, when he worked directly for the Commission. Thus, to say that the Director, OI, has the authority to initiate investigations on his own authority, but that the EDO must submit a written request, made sense at the time. Now the EDO is my second level supervisor. Am I really free to exercise this authority over his objections? Do I stick to my guns every time we have a disagreement, or do I begin to compromise in smaller, seemingly less important matters?

In the past, OI investigations have occasionally identified NRC program deficiencies or staff actions as contributing to licensee violations investigated by OI. As a Commission-level office, we were free to pursue all logical investigative leads regardless of whether they might antagonize senior NRC managers. Now we are part of the staff, it is obviously prudent to pause and weigh the gains versus losses in perusing those kinds of issues.

The consequence of structuring an investigative office in this manner is that it places me or any future OI Director in a situation where there is considerable pressure not to seem unreasonable, to appear to be a "team player." It would take a very strong person, indeed, to put aside fear of censure and continue to make investigative decisions consistently without regard to those considerations.

Another consequence of OI being moved under the staff could be the loss of OI's candid advice or opinions regarding various regulatory initiatives impacting on the investigative program. Over the years, OI has provided the Commission its views on such issues as Material False Statements, Fitness for Duty, which is use of drugs at power plants, and the proposal to reopen closed enforcement cases only when a licensee would benefit. As a staff office, OI no longer has the same freedom or opportunity to provide our views regarding staff initiatives about which we disagree. For instance, our views have not been solicited on the proposed Fitness for Duty rule, notwithstanding our extensive comments on this subject in the past.

Over the past 5 years, OI has established an excellent reputation among critics of past NRC investigations. For example, we now have an excellent working relationship with the U.S. Department of Justice and have been able to work effectively with public interest groups or interveners. The fact that OI as a Commission office was not a party to licensing proceedings facilitated this cooperation. Conversely, as a staff office, OI is now a party to those proceedings.

One of the benefits to the NRC of the appearance of OI's independence and integrity has been the increased willingness of allegers to bring information to us. Thus, important public safety concerns might have gone otherwise unreported, or have been reported only through third party groups, or reported directly to the NRC. One of the factors that made our efforts credible to allegers was OI's status as a Commission-level office. It is an unpleasant reality that many persons outside the NRC have a distinct distrust of the NRC staff. Whether this distrust is warranted is not the issue. The point is this perception can have some very real effects such as a reluctance to bring allegations to the NRC in a timely manner. Although it may be too early to tell, it appears to us that there has been a downturn in allegations to OI from both individuals and groups since our placement under the staff.

This matter of perception also has impacted within the NRC, OI's former status as a Commission office was a clear statement to the staff of the Commission's interest in and support of the NRC investigative program. This consequently assured the cooperation of all staff personnel, even those whose appreciation or support of the investigative program was less than totally enthusiastic. Moving OI further down within the NRC organizational structure communicated just the opposite message to the staff.

I have only highlighted some of the ramifications of our placement. I will continue to discuss the effects on the morale of OI and the need for prompt action to remedy our current situation.

Effective March 1, the Commission made a decision to place us and make us a part of the staff. This had a devastating blow to the morale of OI. 100 percent of my headquarters technical staff have advised me they intend to seek employment elsewhere. Three of my five office directors around the country have indicated the same. Three out of four investigators at one of my offices have already been interviewed by another investigative agency. They are seeking employment elsewhere. We are trying to deal with that and carry out our programs as mandated by the Commission.

There exists an internal report, commonly called the Thompson Report, which has not been shared with us, which the Commission charged four executives within the NRC to prepare. The purpose is, my understanding, to give the Commission some insight as to how OI could be assimilated within the staff. I am anticipating in the future additional placement of OI or some other action by the Commission in terms of where OI is going to be fitted into the staff.

I think the quickest fix to get over the morale problem and the resource problem that I think the Commission is going to be faced, is for the Commission to restore OI to its former status as a Commission level office with the understanding that the authorities and responsibilities of OI prior to February 1, 1988, remain in effect.

In testimony before you on April 27, Senator Glenn, General Accounting Office, commenting on the Breaux-Simpson bill, noted it was difficult to justify the need for two investigative offices in the "functions of the Assistant Administrator for Investigations as proposed by the bill would appear to duplicate the work of the Inspector General and agency staff . . . ." In May of last year, I sent a letter to you recommending that OI and OIA be combined. The Commission has the authority now to combine OI and OIA as a non-statutory Inspector General. I would urge the Commission's consideration.

In conclusion, if time were not a factor, my clear first choice would be the statutory Office of the Inspector General consisting of both OI and OIA. My second choice would be the Breaux-Simpson bill or H.R. 4140, the bill introduced in the House by Representatives Sharp and Gejdenson. I prefer the latter for pragmatic reasons; that is, the chances of it reaching fruition faster because it decouples the OI fix from the more politically charged issues such as the single administrator. But as I noted above, time is a factor.

I fear the erosion of the fact and appearance of OI's independence will continue unless something is done quickly, as will the loss of highly valued OI employees. Our frustration increases daily. We have yet to hear testimony from anyone suggesting the investigative function has been improved by placing it under the staff. To the contrary, the testimony at your April 27 hearing, as well as that of the April 26 Udall hearing, clearly supported the need for OI to be a Commission-level office. Indeed, it appears that 9 out of 10 present or former NRC Commissioners favor having OI report directly to the Commission. Yet, here we are—still under the staff. Candidly, I do not understand why.

Senator Glenn, the men and women of the Office of Investigations clearly appreciate your past efforts to help us. We are most grateful to you. We would most certainly appreciate anything you could do for us now. That ends my prepared remarks, Senator. I would be pleased to answer any questions.

Chairman GLENN. Thank you, Mr. Hayes. I was not aware of the Thompson Report. Who originated that? Was that originated by the Commission or the Chairman or who?

Mr. HAYES. That was originated by the Commission, Senator.

Chairman GLENN. As a group?

Mr. HAYES. As a group. Four executives within the Commission studied how OI does its mission, the FTE's of OI, the processing reports, our grade structure. Where our people are located? What our function is? And have prepared a written report that has been presented to the Commission.

Chairman GLENN. Was this report aimed only at OI or was this an agency-wide study of how the NRC does its business in general?

Mr. HAYES. No. This was specifically aimed at the Office of Investigations.

Chairman GLENN. Well, we do not have a copy of that document. Was this an internal document? Was it to be released, or was it a private internal study just for use of the Commissioners only?

Mr. HAYES. At this point the only people that I am aware that have copies are the Commissioners and possibly the Office of General Counsel. I am not aware of anyone else within the Commission that has a copy of that. It has not been shared with us, nor has the details been discussed with me personally.

Chairman GLENN. Would you repeat again exactly how it changes your operation? This report proposes to change your operation, is that correct?

Mr. HAYES. Yes. It was a study commissioned by the Commission itself to do a study of OI to see where OI could best be placed within the staff, and the results, I do not know. I do not know what their recommendations are, Senator.

Chairman GLENN. Have any others been implemented?

Mr. HAYES. No, Senator. There have been management reports.

Chairman GLENN. But, just knowledge of this resulted in your people looking in their best interest for other employment, looking for another job that was going to be more secure than what they saw occurring at NRC, is that correct?

Mr. HAYES. That is correct. I received a telephone call from the Chairman one morning advising me that I was to report effective February 1, to Mr. James Taylor. In a subsequent meeting with the Chairman, he advised me that he intended to have a group of individuals study the Office of Investigations for recommendations to the Commission. That action has been done. A report has been written.

Chairman GLENN. But your actual reporting channels then were changed as a result of this.

Mr. HAYES. Not as a result of the study. But it previously had been done by the Commission's vote.

Chairman GLENN. Well, this one we obviously want to follow's up on and we will definitely look into this further.

Mr. Hayes, you are an SES employee. Is your position what we call a career-reserved position, as opposed to a general position?

Mr. HAYES. It is a career-reserved, Senator.

Mr. GLENN. Career-reserved, okay, which means that it can be filled only by a career appointee, someone with the proper qualifications for that job.

Mr. HAYES. That is correct.

Chairman GLENN. Do you believe that the Office of Investigations' position should be a career position.

Mr. HAYES. Absolutely.

Chairman GLENN. Yes. The bill would have OI perform such functions as the administrator shall designate, including investigating intentional violations of statutes the administrator is charged with implementing. Does this jurisdictional statement differ from the one now granted to OI?

Mr. HAYES. I do not believe so, Senator. That is our basis mission today and I think it is captured in the proposed legislation.

Chairman **Glenn**. Yes. Do you have sole authority to hire staff for OI?

Mr. **Hayes**. I do not.

Chairman **Glenn**. You do not. Who has to approve that?

Mr. **Hayes**. My authority to hire is a function of authorities from the Chairman and the Commission.

Chairman **Glenn**. How many people do you have working under you?

Mr. **Hayes**. I have 44, sir.

Chairman **Glenn**. If you want to hire someone, and you already have stated that some of your people are looking for other employment, how do you go about replacing them? Do you interview people and then it has to be approved above you?

Mr. **Hayes**. No, sir. The field investigative positions are filled, interviewed, and we make the determination internally. Where the problem may arise is now that we are a part of the staff, under the EDO, the EDO is the senior person in charge of roughly 28 or 2,900 employees. They could detail staff into the Office of Investigations, a non-investigatory type staff, or I would presume that they do have the authority, even though it has not been exercised, to prohibit the hiring or the firing of investigative staff.

Chairman **Glenn**. Do you have subpoena authority now?

Mr. **Hayes**. Yes, sir, I do. It is an authority delegated to me from the Commission.

Chairman **Glenn**. Okay. The Commission itself has the basic authority and they delegate that to you, if you need it for your investigations.

Mr. **Hayes**. Yes, Senator.

Chairman **Glenn**. You testified that you disagreed with the provision of the bill which would allow the administrator to prevent the initiation of an investigation if "public health and safety requires otherwise." Would you explain what you would do if you opened a case to investigate wrongdoing in the industry and the administrator came to you with concerns about the investigation's impact on the public health and safety?

Mr. **Hayes**. Well let me say, as I read the legislation, the proposed legislation would even prohibit the initiation of an investigation. I am opposed to that. I think that if there are indications of wrongdoing that whoever the director of the Office of Investigations is at the time should have the authority and actually the responsibility to initiate an investigation. In the past we have done that when we thought that was the right thing to do. We have worked with the staff where there may be an impact on the public health and safety through the investigative process. In my 5½ years as a director, I cannot remember one instance where we were asked not to pursue an investigation based upon it's affect on public health and safety. So that portion of the bill, I think, ought to be looked at very, very closely. Otherwise, I think, it could be used to thwart an investigation.

Chairman **Glenn**. What kind of an investigation would interfere with public health and safety? I am not sure how to state the issue more clearly, because I am not sure I quite understand the need for such a limitation. If you are investigating something, it is involved with public health and safety as far as I am concerned.

Mr. HAYES. I agree.

Chairman GLENN. The bill would allow the administrator to prevent the initiation of an investigation if public health and safety requires otherwise. How could there be a situation quite like that? I do not understand it.

Mr. HAYES. The only thing that I could reach toward would be an example of the Three Mile incident. The accident there. The first priority is to stabilize the reactor. The technical staff, the operators of that reactor, would be doing that on an ongoing basis. You would not necessarily want to pull them out of the control room while they were trying to stabilize the reactor. That to me is the only scenario I can think of that might fall within that provision. But again, in my experience with the Commission, we have never been asked not to do something from a health and safety standpoint. I am just not sure what that means.

Chairman GLENN. I am not sure I do either. It is something that we may want to follow up on a little bit more later on. Thank you.

Mr. HAYES. Thank you.

Chairman GLENN. Thank you. Our next panel are former Commissioners of the Nuclear Regulatory Commission: Mr. James Asselstine, Peter Bradford, Victor Gilinsky and Marcus Rowden. You are on my sheet here in alphabetical order, and I guess we can proceed in that order. Mr. Asselstine, we welcome your testimony, either in it's entirety or an abridged version. In any event, all of your testimony will be included in the record in its entirety. We look to you former commissioners for particular expertise in this area because you have seen the operation of the NRC from the inside, have been part of the operation, and can give us advice in these areas. So proceed.

TESTIMONY OF JAMES K. ASSELSTINE, FORMER COMMISSIONER, NUCLEAR REGULATORY COMMISSION[1]

Mr. ASSELSTINE. Thank you, Mr. Chairman. I do appreciate the opportunity to offer a few comments on the various legislative proposals now being considered by the Congress to reorganize the Nuclear Regulator Commission. I intend to focus my remarks on the proposals to protect the independence of the NRC's Office of Investigations, to create an independent Nuclear Safety Board, and to replace the NRC with a Nuclear Safety Agency headed by a single administrator. Briefly, I support efforts to protect the independence of the NRC's Office of Investigations. In addition, I support the creation of an independent Nuclear Safety Board to evaluate and advise the NRC and the Congress on significant nuclear operating events. And, I continue to support the retention of the Commission organization structure for the NRC as opposed to a single administrator. In each of these areas, I have some concerns about provisions in the version of the Nuclear Regulation Reorganization and Reform Act of 1988, which was ordered reported by the Senate Environment and Public Works Committee and I will highlight those as I go along.

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[1] See p. 172 for Mr. Asselstine's prepared statement.

On the subject of the NRC's Office of Investigations, I support efforts to protect the independence of OI. The credibility of the NRC's Office of Investigations is an essential component of the agency's credibility as an effective regulator. The NRC does not have the resources to do more than audit its licensee's programs. The NRC must be sure, therefore, that licensees are not purposely circumventing its regulations or failing to report significant information necessary for the NRC to make informed decisions. By investigating and providing the information necessary to support enforcement action when a licensee willfully violates NRC regulations, OI's efforts help to ensure the integrity of licensees' programs so that the Agency can rely on the licensees to carry out their responsibilities. Further, there is a direct connection between the respect of the public for the NRC's investigatory efforts and their belief in the integrity of the agency's regulatory process. A strong, competent, and independent OI helps to ensure that people believe the agency is truly interested in uncovering wrongdoing and in enforcing its regulations. This in turn leads to enhanced trust in the NRC to protect the public health and safety. Efforts to make the office more independent and to protect the integrity of OI's investigations, in my view, can only help to ensure that OI can continue to perform this vital function.

Before the Office of Investigations was created, the NRC's investigations of wrongdoing issues lacked credibility, both with the public and with the Department of Justice. Investigations often were performed by inspectors who were not trained investigators, who did not know what questions to ask, and who did not know about techniques for gathering and protecting documents. As a result, investigative reports were not competent or complete. In addition, there was a perception on the part of some that the NRC staff was not objective about wrongdoing issues because investigations got in the way of licensing plants. Given this less than competent performance and a perception of sponsorship of license applications by the NRC staff, both the Department of Justice and the public concluded that the NRC was not serious about uncovering wrongdoing.

In order to obtain credibility, the Commission decided to establish an Office of Investigations which would be independent of the NRC staff, which would report to the Commission directly, and which would be composed of trained, professional investigators. Because of the NRC staff's poor past performance, the Commission felt that a Commission level office as essential to establishing trust in the investigative function. OI has been effective in doing just that. NRC's relations with the Department of Justice improved immensely largely because OI investigations were performed in a competent and professional manner. In fact, the NRC has received several letters from the Department of Justice commenting on the high quality of OI's work. And, public trust in the investigative function has been enhanced by OI's performance, and by the fact that OI has been independent of the NRC staff.

I would have to say that the recent decision by the Commission at the urging of the House Appropriations Committee to have OI report to the NRC staff is a step backward, and legislation is probably needed at this point to restore OI's independence and preserve its effectiveness. One proposal to accomplish this result is H.R. 4140. Another example is subsection 131(a) of the bill ordered reported by the Environment and Public Works Committee, which could be adapted to fit the Commission form of organization as well as a single administrator.

I have one concern, however, with the Environment Committee provision. That provision would prevent the head of the Office of Investigations from initiating an investigation on his or her own initiative if the Administrator determines that the public health and safety requires otherwise. In my view, this qualification on the——

Chairman Glenn. Let me interrupt there just a second.

Mr. Asselstine. Yes, sure.

Chairman Glenn. I was going to save questions until later, but can you define such a situation? I asked about that a minute ago.

Mr. Asselstine. I cannot, Mr. Chairman.

Chairman Glenn. How would you define that?

Mr. Asselstine. Mr. Chairman, I share the same view that Ben Hayes has. I cannot think of a single situation in my experience when I was on the Commission of an instance in which an OI investigation would adversely affect safety. In fact, my view is that quite the contrary. Conducting investigations of possible wrongdoing is something that is essential to the agency carrying out its health and safety measures.

Chairman Glenn. He gave an example of TMI or something. Obviously if you have people involved directly in trying to control an imminent disaster like that——

Mr. Asselstine. Sure.

Chairman Glenn. You are not going to call them off the job to start an investigation or insist that they come to a hearing or something at that time. You cannot legislate to protect against a lack of common sense like that.

Mr. Asselstine. Exactly, Mr. Chairman. Yes, I could not agree more, no.

Chairman Glenn. Go ahead.

Mr. Asselstine. So I think that provisio[illegible]s unnecessary. What is more I think it is dangerous because there is a misperception that is held by some within the NRC staff that wrongdoing investigations are unrelated to safety and may actually interfere with the agency's safety mission. If you include a provision like this in the legislation, what you do is reinforce that misperception and I think you need to send the opposite message. I would recommend deleting that provision.

On the subject of the Nuclear Safety Board, one other element as well, Mr. Chairman. I would also support action to preserve the current job classification of OI employees. I think without this protection, I think some of the concerns that Ben Hayes expressed to you about his people leaving that office, are likely to come true and the strength of that office has been in it's trained and expert investigators.

On the subject of the Nuclear Safety Board, I believe that an independent safety board is needed to assure that the NRC and the industry learn the crucial lessons of operating experience at the plants. Although improvements have been made in recent years in the NRC's ability to investigate serious operating events, the Agency's capability to seek out and correct the root causes of these events is still not what it should be. It is simply not realistic to expect that the NRC will be able to evaluate in a critical and objective manner its own past performance. A Nuclear Safety Board would provide the necessary independence and objectivity. To avoid the proliferation of advisory committees, I would abolish the NRC's Advisory Committee on Reactor Safeguards. In view of the decline in the Commission's licensing caseload and the increasing importance of operating experience at the operating plants, I believe the Commission, the Congress and the public would be better served by adding a Nuclear Safety Board and by eliminating the ACRS. Good models for a Nuclear Safety Board can be found in S.14 and H.R. 3285, and I support those.

There are also provisions for a Nuclear Safety Board in the Environment Committee bill. However, I have several concerns regarding these provisions. First, unlike S.14 and H.R. 3285, under the Environment Committee bill only one of the three members of the Safety Board would be appointed by the President and confirmed by the Senate. The remaining two members would be appointed by the single administrator, although, I gather, they could only be removed by the President. This arrangement in the Environment Committee bill has several drawbacks. First, the fact that the single administrator will appoint a majority of the Safety Board for relatively short terms of 3 years and the fact that these Board members can be appointed from the regulatory staff whose performance the Board is intended to evaluate jeopardizes the independence of the safety Board. Moreover, I understand that the Department of Justice has raised constitutional concerns regarding the appointment and removal provisions for the Safety Board members in the Environment Committee bill. Whether or not the concerns of the Department of Justice are valid, it seems to me the fact that the Department has serious reservations about the constitutionality of these provisions is significant. At a minimum, the existence of such concerns is likely to impair the effectiveness of the Safety Board for a period of years while the issues are resolved by the courts. Both to ensure its independence and to ensure that the Safety Board will be able to carry out its important functions, I would suggest that all of the Board members be appointed by the President and confirmed by the Senate.

Second, the Safety Board provisions in the Environment Committee bill establish a very high threshold for the types of nuclear operating events that the Safety Board can investigate. Under this threshold, the Board may only investigate on its own initiative significant safety events, which are defined as moderate exposure to, or release of, radioactive material, a major degradation of essential safety-related equipment, or a major deficiency in the design, construction, use of, or management controls at a nuclear facility. In addition, before initiating the investigation, the Board must provide a written justification for its determination that the event meet this threshold. Taken together, these provisions are likely to provide some chilling effect on the Board's ability to investigate operating events at nuclear facilities that are of safety significance. At a minimum, they are likely to lead to some disputes between the Board and those it proposes to investigate over whether the various tests have been met. Rather than attempting to define in advance all of the types of events that might qualify for investigation, I would suggest setting a broad standard in the legislation, such as significant safety events, and leaving it to the judgment of a Board appointed by the President and confirmed by the Senate to determine whether the broad standard has been met on a case-by-case basis.

On the subject of converting the present NRC Commission organizational structure to a single administrator form of organization, I would say that both the Environment Committee bill and H.R. 3285 present generally workable approaches. However, if the Congress chooses to restructure the NRC as a single administrator agency, I believe that this change should be accompanied by a strong and independent Nuclear Safety Board, statutory protections for the Office of Investigations, and an independent statutory Inspector General along the lines of the provision already approved by the Senate. A package such as that contained in H.R. 3285 would accomplish this result.

I would note at the outset, Mr. Chairman, that there appear to be somewhat conflicting goals and objectives for the various reorganization proposals being considered for the NRC. For example, changes such as an independent statutory Inspector General, statutory protection for the Office of Investigations, and an independent Nuclear Safety Board seem to have as their objective providing greater accountability and an improved system of checks and balances to address perceived problems in the Commission's current operations. In contrast, the single administrator reorganization has as its objective greater streamlining and efficiency, and more centralization of authority than under the existing Commission form. It is not entirely clear to me that the various goals and objectives of these reforms are entirely consistent with each other.

I do not want to overstate the benefits of the Commission form. But I also think that we should not fall into the trap of thinking that a single administrator reorganization is a panacea for all of the NRC's problems. In the last analysis, I suspect that the quality of people selected to direct and manage the agency are more important than the organizational structure itself. I would also note that a single administrator organization structure can work effectively, and there are several good examples in the Government. And I would agree that the Commission form of organization can be frustrating at times, both to commissioners as well as to the Congress. Nevertheless, I continue to see some significant advantages to the Commission form.

First, I believe that the complex, wide-ranging, and often polarized policy issues which come before the Commission benefit from review by a group of people with diverse backgrounds, experiences and perspectives. Properly implemented, the Commission form results in a more open and deliberative decision-making process in which competing views are aired and considered before reaching a conclusion. Such a process affords the public a greater opportunity to understand the significant issues which come before the NRC and to observe how their government is addressing those issues. Although the role of the NRC is shifting somewhat from a licensing agency to an agency that must oversee an industry with more than 100 operating nuclear plants, the issues that come before the Commission remain complex and continue to present broad public policy questions that would benefit from a collegial decisionmaking process.

Second, with the Commission form, change occurs more gradually than is the case with a single administrator. Under the Commission form, only one of five members is typically replaced each year, providing a sense of continuity to the decision-making process. In addition, the Commission is served by a relatively stable professional staff, including the agency's senior technical managers. In contrast, with a single administrator, there is like to be more rapid turnover in personnel, not only at the top of the organization, but also in what have traditionally been the senior technical staff positions. These more rapid changes are likely to lead to wider and more rapid swings in policy and to a loss of continuity. The nuclear industry argues that it has special needs for predictability and stability. Recent experience indicates that as much as 10 to 15 years are required to plan and build a nuclear power plant, which is then expected to operate for a period of 40 years or more. Given these durations and the industry's arguments for predictability and stability, I am not convinced that the single administrator form best serves the particular needs of this industry.

Third, the single administrator form also creates some interesting difficulties. One example is the licensing responsibility for high-level radioactive waste storage and disposal facilities. There is an obvious difficulty in giving one Executive Branch single administrator authority to make a licensing decision on a application proposed by another Executive Branch single administrator and recommended by the President. As is the case with the Environment Committee bill, one can end up with the situation in which a final decision on a major issue such as the licensing of a high-level waste repository will be made at a lower level within the agency and not by the agency head, or at least with the authority of the agency head to review the staff decision being severely limited.

The principal argument advanced by the proponents of a single administrator form has traditionally been that a single administrator will lead to better management and greater efficiency and accountability than is the case with the Commission form. Although there is always room for improvement in these areas, I believe that improvement can be achieved by other means within the Commission structure. One alternative, for example, is to strengthen the role of the Chairman as the day-to-day manager of the NRC staff and as the initiator of the policy proposals to be considered by the Commission. My sense as an outside observer over the past year is that Chairman Zech has moved in this direction. This approach would maintain the benefits of a collegial decision-making process, would ensure continuity, and would avoid the inevitable disruption of a major agency reorganization. Still another alternative would be to reduce the size of the NRC from five members to three, although I tend to favor the stronger Chairman alternative.

Mr. Chairman, for these reasons, I believe that there are significant advantages to the Commission organization form for the NRC which justify its retention. At the same time, I believe that there are alternatives within the Commission structure to accomplish the perceived benefits of a single administrator structure without its disadvantages. Thank you.

Chairman Glenn. Thank you very much.

TESTIMONY OF PETER BRADFORD, CHAIRMAN, N.Y. STATE PUBLIC SERVICE COMMISSION [1]

Mr. Bradford. Senator Glenn, it is a pleasure to appear before the Committee again. I have been a State Regulator since 1971, except for 5 years on the NRC from 1977 to 1982. I have chaired the Maine and the New York Commissions and I am the immediate past president of the National Association of Regulatory Utility Commissioners. I am not appearing today on behalf of any of those organizations, but I do mention them to show that I am pretty familiar with the pluses and minuses of commission regulatory structure from a number of different perspectives.

I have testified on the single administrator concept before, always in opposition. I have attached copies of that testimony and I will not dwell on their points again today. Basically, I have opposed such legislation because it purports to solve problems that in fact nuclear power does not have, while distracting from the real problems that have beset this technology for decades. It will not improve nuclear safety, and without that, it neither will nor should enhance public confidence.

The question worth examining today is whether to events of the last few years have produced greater justification for the single administrator concept than that which existed when Congress wisely rejected the idea in the aftermath of Three Mile Island. The only relevant changes that come to mind are the virtual end of the NRC's reactor licensing function and the makeup of the Commission itself. Of these two, the first merits the more serious discussion.

Multi-member regulatory agencies at the State or Federal level are inherently less streamlined than the single administrators. In return, they tend to be somewhat more impervious to Executive Branch control than to sudden change, as well as more open to public scrutiny. In addition, when running smoothly, they offer the potential that several heads will be wiser than one. It is this latter characteristic, coupled with the stability inherent in the fact that their multi-member character resists sudden change with a new administration, that commends them in situations calling for adjudicatory wisdom and predictability over long periods of time.

Because of the fundamental shift in the NRC's missions from the reviewing of license applications to the overseeing of operating reactors, it is valid to ask whether the commission format is still sensible. The Commission structure was, after all, chosen in the years following World War II when the Atomic Energy Commission was given the solemn mission of overseeing the production facilities for the atomic and then the hydrogen bomb, as well as the nuclear navy. Peaceful uses were a very small part of the program, though a large part of its dreams.

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[1] See p. 179 for Mr. Bradford's prepared statement.

Collegial wisdom, with its checks and balances, was highly prized but public adjudication was not contemplated, for the first power plant was a decade away, and keeping nuclear secrets was, in fact, viewed as being far more important than an open process.

In the ensuing decade, Congress set up what was for that era a remarkably open and extensive licensing process. In return, nuclear energy was exempted from any meaningful State controls and was also given the limitation of liability contained in the Price-Anderson Act.

Within a dozen years, the Atomic Energy Commissioners had set up the licensing board and the appeals board structure to deal with what was considered to be routine reactor licensing. Their own interest had more to do with spreading the benefits of nuclear power around the world, as well as moving rapidly to breeder reactors and reprocessing plants. Such mundane issues as reactor safety and waste disposal received unfortunately short shrift at the Commission level.

Congress grew increasingly impatient with the AEC's unwillingness to take seriously the public's concerns about the safety of the relatively untried light water reactors. And ultimately the Congress broke up the Atomic Energy Commission in 1975.

While 80 percent of the AEC went into the Department of Energy, the Commission structure, together with the licensing and reactor oversight process, went to the Nuclear Regulatory Commission. Interestingly, not one reactor ordered after that date was ever built, and new orders ceased altogether by 1978. This result has, of course, little to do with the choice of a Commission structure. Though the frustrations that go with it are very much part of the history of the single administrator proposal and its early years with its attended removal of skeptical commissioners when such there were.

The licensing decline is the product first and foremost of economic forces followed closely by the Three Mile Island accident. The NRC itself, at least in its early years was as monolithically determined as the AEC had been or as any single administrator could have been to keep the reactor licensing program going. Indeed, the public perception that that determination took precedence over resolving safety concerns contributed considerably to the growing community unacceptability of nuclear power plants since 1975. Nevertheless, with fewer than a dozen operating licenses left in the pipeline, it is fair to ask whether the predominant future task of overseeing the safety of operating rectors is appropriate to the Commission structure. If that were the only issue, I think that the answer would favor the proponents of the single administrator. However, before moving in that direction, I think that Congress must address the waste repository issue that Mr. Asselstine has already mentioned. It must also address the handling of export licensing, the possibility, however remote, of future nuclear power plant applications, other necessary reforms and the preservation of a skeptical function in the nuclear regulation. When the Congress has done so, I think that it will find that this legislation is at least premature.

I say this despite the severe temptation to regard the single administrator proposal as a quick way to allow the incoming administration to sweep out the present NRC, which does little credit to the concept of the independent regulatory commission. Whatever the strengths of the Commissioners as individuals, the present NRC is not skeptical; it has no adjudicatory or policy-making sense of itself; it is rarely a source of independent perspective to the public or to the Congress, and a majority or its members do not even believe that the jobs that they hold should continue to exist.

Nevertheless, the single administrator, especially one empowered to appoint a majority of the safety board, is the wrong answer. For one thing, it is no panacea, as the recent careers of Ann Gorsuch and James Watt, among others, have shown. For another, not all or even most regulatory agencies are paralyzed by squabbling, as the ongoing and basically favorable experience of the 50 States shows.

The present structure is not the source of the agency's problems. The Commission structure did not cause investigative documents to leak to Middle South Utilities. The Commission structure did not repeatedly frustrate Justice Department inquiry into potential criminal violations at the power plants. The Commission structure did not harass employees who were pursuing safety concerns. And the Commission structure did not make a fool of itself by adopting in the name of realism an emergency planning rule based on fantasy.

These were failings of attitude, and they would have loomed just as large under an administrator. Only legislation requiring generic safety issues to be resolved by fixed deadlines, requiring intervenor funding or other assistance, and curtailing Federal preemption would provide the kind of balanced incentive that offset the message inherent in movement toward a single administrator in the context of the history that I have outlined.

Even then, a separate licensing tribunal should be created for the waste facility and for export reviews, and the concept should be kept alive in the remote event that reactor licensing once again becomes a possibility. As to export reviews, in particular, it is important to note that review by a single administrator within the Executive Branch cannot provide the independence that Congress sought when it empowered the NRC to review the export licensing decisions of State and the Department of Energy in the 1977 legislation.

To accept the legislation before you as it is, is to endorse the proposition that the NRC's failings have been structural or, more plausibly, that whatever the source of its failings, the cure can be structural.

As you look back at the extent to which Congressional and public knowledge about nuclear regulation has often come not from the chair and the staff, but from individual commissioners, you can see why these bills in their present form cannot improve nuclear safety.

Chairman GLENN. Thank you, Mr. Bradford. Your comments about export licensing fall on particularly receptive ears here.

Mr. BRADFORD. I thought that they might.

Chairman GLENN. That is one issue I have been very, very much involved with and not necessarily happily so in light of some things that have happened. But, thank you very much.

TESTIMONY OF VICTOR GILINSKY, FORMER COMMISSIONER, NUCLEAR REGULATORY COMMISSION [1]

Mr. GILINSKY. Thank you, Mr. Chairman. I am going to concentrate my remarks on the safety board provision in the bill and I would like to make two points. The first is that the safety board is an essential part of this package, if the whole is to result in improvement over the current state of affairs. The second is that there are some modifications which I would like to suggest if that board is to be really effective. The need for a board is fairly obvious and it is pretty well stated in the proposed findings in the bill.

The point is simply this, that you cannot expect people that have been involved in incidents or accidents to dispassionately investigate their own participation. We know that an independent safety board has been in place to review events in commercial aviation for 50 years. You proposed a board for the Department of Energy. It would be useful to have one in the area of commercial nuclear power. The question of independence of that board becomes especially important if we are talking about moving to a single administrator. If it were just a matter of adding a board to the current Commission, a restructured ACRS with a different charter might be the way to go. But if we are talking about a single administrator arrangement, while on the one hand we will have the benefits of greater efficiency and accountability, on the other hand we will also have more centralized control over information and a lesser tolerance for divergence from mainstream views. To balance this tendency, we need to have a really independent, fully independent, board which can make findings on probable causes and make recommendations for improvements, even if those are likely to displease the administrator. That is really the essential point.

For that reason, it would be wrong to have the administrator appoint members of this board. Under the bill, he or she would appoint two of the three members. In effect, a majority of the persons who would be reviewing the administrator's proposal. That does not seem to me to be the way to go. Among other things, that would also lead to conflict between the member appointed by the President and the administrator's persons. Again, it would impede the effectiveness of that board.

I would also not set down in law the precise threshold for matters to be investigated by that board. The subtleties of nuclear safety are not something can be easily put down in law. The persons on the board would have been selected for their technical competence and integrity. There are various legal standards spelled out. You should leave it to their good sense to decide what is important to investigate. Thank you, Mr. Chairman.

Chairman GLENN. Thank you very much, Mr. Gilinsky. And now Mr. Rowden.

TESTIMONY OF MARCUS A. ROWDEN, PARTNER, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON [2]

Mr. ROWDEN. Thank you, Mr. Chairman. I will give an abridged version of my testimony. Nonetheless, I think it will be fairly clear that my perspective is markedly different than that of my colleagues on the panel today.

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[1] See p. 204 for Mr. Gilinsky's prepared statement.

[2] See p. 207 for Mr. Rowden's prepared statement.

The most far reaching of the organizational measures before the Committee would supplant the current collegial management of the Nuclear Regulatory Program with management by a single administrator. I have long been an advocate of such a change.

In testimony over the past several years before Committees of both the Senate and the House I have strongly supported the change to single administrator management. The Commission structure in my view, has proved itself seriously flawed. I do not propose to recount in these brief remarks the multiple reasons for my position. To state them in capsule form, the commission structure impedes effective agency management, impairs policy planning and regulatory decision-making and, most important of all, for me at least, it defeats clear authority and accountability for agency performance—not only within the agency, but at the highest levels of the Government, the White House itself. I believe that the basic approach to single administrator restructuring embodied in the Nuclear Regulation Reorganization Reform Act, that is Title I of that Act, is sound. I would hope that its legislative realization can be achieved during the present Congress.

I do have a comment on an issue which was raised during the Committee's April 27 hearing on this proposal. Namely, whether the administrator of the proposed Nuclear Safety Agency should serve for a fixed term, and relatedly, whether that term should be different in its commencement and termination—that is, staggered—from that of the appointing President. I understand the reasons behind that particular question being posed and though I am sympathetic to the desire for assuring objectivity in regulatory decision-making and continuity in the regulatory program itself. I believe that a fixed term would be a serious mistake. It would insulate the administrator and, equally importantly, the President who appoints that administrator, from political accountability for agency performance—an accountability, which is a central purpose in single administrator restructuring. A staggered term, I think it is clear, would exacerbate that failing.

Moreover, a fixed term for the head of an Executive Branch agency would, to my understanding, be a radical departure from established governmental practice—a practice which is sound and one which I believe should be maintained in this case. A President should be able to appoint as the agency's head someone who is representative of his administration's policies; who would serve at the President's pleasure; and for whose performance the President would be accountability. If the President is to be accountable, he must have the means for Executive Branch oversight of the agency, just as he does—through OMB primarily—for other agencies within the Executive Branch.

With all of their limitations, the Senate confirmation process and the Congressional oversight process—together with the very real safeguards provided by regulatory procedures mandated by the Atomic Energy Act and the Administrative Procedure Act—do provide meaningful safeguards against politicizing the regulatory agency's processes and decisions. I think that a strong professional staff will provide, or can provide, the underpinning for continuity in the regulatory program.

The Nuclear Regulation and Reorganization Reform Act proposes other organizational changes to the NRC in conjunction with the establishment of single administrator management: Creation of an Inspector General for the agency; statutory status for its Office of Investigations; and establishment of an independent Nuclear Reactor Safety Investigations Board—the so-called safety board.

Before I comment briefly on each of these, let me state what to me at least is a central factor in evaluating the wisdom of the structural changes that this bill proposes.

I strongly believe that responsibility for nuclear safety regulation should reside in a single regulatory body—one which possesses the authority, the resources and the expertise to discharge its safety mandate, and which is accountable to the political branches of Government for it's performance. That to me is at the heart of any move to single administrator management for the Nuclear Regulatory Program. Establishing other agencies or entities with conflicting, duplicative or overlapping regulatory missions is, in my view, a prescription for contention, confusion and regulatory instability—none of which serves the interest of safety, let alone that of good Government.

With that as a bench mark I would like to examine briefly the several proposals for collateral changes to the nuclear regulatory organization that the Committee has before it.

I have no difficulty with the concept of a Presidentially appointed official who would perform for the Nuclear Regulatory Agency, the conventional functions of an Inspector General—investigating fraud, waste and corruption within the agency and among its contractors. In the past such a post has been limited to the cabinet departments and the larger Government agencies. If that is what the Congress desires for the nuclear regulatory agency I think the most sensible way to achieve it is by amending the Inspector General Act of 1978 to include the new agency within its provisions. This is the course charted in the Inspector General provisions of the Nuclear Regulation Reorganization and Reform Act and in S. 908, the Inspector General Act Amendments which the Senate adopted earlier in this session.

I am not convinced, however, of the need for giving statutory status to the Office of Investigations (OI). I am opposed to any measure that would lessen the supervisory authority of the agency's head over this staff office. The Office of Investigations performs functions for the Nuclear Regulatory Agency which are integral to the discharge of its licensing and regulatory responsibilities. In my judgment, it would be counter-productive for an agency that has those responsibilities not to have control of a function needed for their exercise. Any statutory provisions defining the organizational status and functions of OI must maintain the ability of the head of the Nuclear Regulatory Agency to set the priorities for and supervise the operation of this office. In my view, the problem with the OI provisions in the measure that the Committee has before it is not the exception to, but rather the dilution of, that basic control. Because those provisions, as I read them, are not sufficiently clear on this point, I would urge that the Administrator's paramount supervisory authority over OI be made explicit in any legislation that the Congress adopts.

Turning then to the Nuclear Safety Board. There have been a variety of proposals put forward in both the House and the Senate for the creation of what has come to be called the Nuclear Safety Board. While the composition and functions of such a board are as varied as the number of proposals themselves, I have yet to see a legislative proposal that I can support, since each transgresses in significant measure the essential principle of centralized responsibility for nuclear regulation which I previously articulated. Objective safety investigation is unquestionably an important element of an effective and credible nuclear regulatory program and I would support statutory means for its enhancement. I have to oppose, however, a safety board proposal that would undermine the unitary authority of the nuclear regulatory agency.

In my judgment, the safety board provisions of the Nuclear Regulation Reorganization and Reform Act create the nucleus for another nuclear regulatory body. In form, as well as in substance, this board would be an independent commission. Though ostensibly an organizational component within the nuclear safety agency, its chairperson and other members would serve for fixed terms and be removable only by the President for specified causes. The board would have funding and staff of its own, would operate independently of the Administrator's direction or supervision, and would have lines of reporting responsibility which run directly to the Congress. Paradoxically, such a parallel body—and collegial at that—would be created as part of a reorganization whose paramount purpose is centralizing regulatory responsibility and accountability.

I do not believe that the National Transportation Safety Board, which is often cited as an appropriate analog, is an apt analog, given the promotional and operational roles played in air transportation by the Department of Transportation and the FAA—roles which are excluded, and properly so, for the nuclear regulatory agency. In short, I see no valid public policy reason why nuclear safety investigation, if that is to be the primary purpose of such a board, cannot be effectively and objectively carried out by the nuclear regulatory agency itself.

If Congress should decide to create such a statutory investigative function, I would urge that it be made part of the Nuclear Safety Agency—in fact and in function—and that the agency's head be given supervisory authority to assure that the board's efforts complement and do not conflict with the agency's regulatory responsibilities. Now, I would add to this a recommendation that such an organizational component be headed by a single individual rather than a collegial body. I question the value of collective authority and responsibility in investigative matters. The objective of investigation is timely and accurate fact finding and reporting; and, to me at least, this can better be realized under the direction of a single individual.

In conclusion, I wish to add a few remarks in which I hope the Chairman will indulge me, since I would be betraying my own convictions if I did not conclude with a plea for reform of the licensing and regulatory process at the same time that Congress addresses structural reform. Organizational reform, as I see it, is only one side of the nuclear reform coin. The process itself is badly in need of change. Those changes are well known and broadly supported. They are built around standardization, pre-approval of designs and sites, and a single-stage licensing process. Legislation has already been introduced in the House which does combine organizational and process reforms—those process changes being consistent with ones already recommended by the NRC itself. I understand that a similar proposal for process reform, one built around the ethic of standardization, will shortly be introduced in the Senate. This, in my judgement, marks the proper course for meaningful reform legislation, as a whole, and I would urge the Congress to follow that course.

Thank you, Mr. Chairman, for the opportunity to contribute my views and I would, of course, be pleased to respond to any questions.

Chairman GLENN. Thank you. Let me follow up on your last comment just a minute and ask the other Commissioners here to get in the act on this. This idea of standardization is something we have talked about ever since I have had anything to do with the industry and ever since I got here. It appears to be, at least to me, it appears to be one of those nice things we would like to see happen sometime but, when you get into it, it is almost impossible to do. These are extremely complex operations as you are all more aware than I. Do you think it is possible to have standardization? What has been the experience with other nations when they have tried to push for standardization?

Mr. ROWDEN. Well, if I may add just a few comments, Mr. Chairman. I think one has to be careful in analogizing the United States program to programs in other nations. There are political, social, and cultural differences as well as differences in the starting point of their nuclear power programs. On the other hand, one has to be impressed by the success with standardization in the French program, with the standardization approach that the Japanese have used, and with the benefits—although that may not be the sole reason for the success of those programs—with the benefits that have been realized with standardization.

This is not a new idea, as you yourself have identified. The industry has been devoting considerable resources to development of standardized designs over the past 15 or more years. The regulatory program has been gearing itself to accommodate the review and pre-approval of those designs. We still have a road to follow in this regard, but I believe it is the right road to follow and I think standardization can be successfully implemented in this country just as it has been elsewhere.

Chairman GLENN. I like the objectives you state and the industry obviously want this. They have been wanting it for years. Standardization, pre-approval of designs and sites and single State licensing process. That all sounds great on paper. Why did you gentlemen not instigate that, if it is such a good idea, while you were all there?

Mr. GILINSKY. The difficulty, Mr. Chairman, has always been that we have had so many more organizations involved in this industry than other countries have. The number of utilities is over 50 and many architects, engineers and so on. So we have had a very much more complicated situation. While everyone gives lipservice to standardization, in fact, no one wants to give up control over their bailiwick.

The thing is more or less academic at this point. There are not any orders on the horizon.

Chairman **Glenn**. Would there be if we had a standardized plant? What if we had a standardized plan that people could get pre-approval of designs and sites and a single State licensing process? Would that speed things up enough and make more economic the construction and operation of nulcear plants, would we get more orders? We have not had an order since the 1970's.

Mr. **Gilinsky**. My own feeling is that those ideas have been overtaken by history, at least for the foreseeable future. I think there is an important point here about standardization. And that is standardizing what we have. Now there is a limit to what you can do, having built these plants. But, you can go a long way towards standardizing training, or standardizing procedures. Also standardizing modifications that we have to make from here on out. In other words, rather than cater to all the different idiosyncracies of the plants, one ought to look to try to make them, in so far as one can, more uniform.

It is in the future one of the things that we are going to have to look at.

Chairman **Glenn**. That is extremely difficult, once a plant has been built though, is it not? And extremely expensive?

Mr. **Gilinsky**. Right, but there are things that can be done. In other words, when you make modifications in control rooms, when you make modifications or set certain requirements, I would try to head in the direction of making them more uniform, rather than less uniform. Now obviously, there is not much you can do with the physical plant. But you can do a great deal toward standardization of training, and standardization of procedures. I think as we move forward one of the things that is going to be a limiting factor on this industry is personnel, and having more interchangeability in personnel would be of tremendous benefit.

Chairman **Glenn**. Anybody else?

Mr. **Bradford**. Senator, you asked why we had not made pre-approved sites of standardization possible. I think we did. But I think that the measures that we took to do it are essentially passed the interest in building the plants along parallel tracks going in opposite directions. Much of the debate over citing and licensing legislation in the late 1970's and early 1980's was whether there really was much in the proposed legislation that had not already been done or could have been done by the NRC. I think in large part, those measures are in place, but they do not have much meaning when new applications are coming at the rate of one or two a year and standardization has no meaning at all in a context in which there are not applications on the horizon.

Speaking now as a State Regulator I do not think we are going to see new applications anytime soon. The States have moved more and more toward a process of looking to the third party power producers bidding against each other to supply new capacity. In every State in which that has been applied it has produced far more third party type generation than had been expected or sought by the utility that has run a bidding system. None of it has been nuclear. None of it is likely to be nuclear, just because the financial community will be so skeptical. At best we are years away and before we get up to a place of new plants that would justify standardization, it would be years beyond even the time in which anyone showed interest again. There is a good chance that it just will not happen at all.

Chairman GLENN. Do you have any comment on that?

Mr. ASSELSTINE. Mr. Chairman, I agree with Peter Bradford's comments. I think the framework was basically in place and that events just overtook it. But I also think that the one element that was necessary to really bring standardization to the point where you would achieve substantial benefits in this country comparable to those that have been achieved overseas, was a lack of discipline. In part on the part of the regulators, but also in part on the part of the industry because there were so many different participants involved.

I think if you are really going to see substantial benefits from standardization, you have to do things like ensure that at the outset when you do the initial regulatory review, that you have a complete enough design so that you really can identify and address all of the known safety issues. So that once you sign off on that design you have a high degree of assurance that you are not going to have to reopen it down the road, because there are issues that you simply neglected to address or because you did not have the information you needed to make firm regulatory judgments. That was not the practice in this country when authorization for construction of plants began.

Chairman GLENN. We have had a tremendous cost increase. I know when I first came here, and I am taking these figures just off the top of my head from memory. But as I recall, when I first came on this Committee and we were looking into some of these things back some 10 or a dozen years ago, at that time a 1,000 megawatt plant coal fired ran about $850, maybe $950 million, something like that. A nuclear plant of the same capacity, 1,000 megawatts capacity was, I think at that time, approximately $1.25 to $1.3 billion, or something like that. And now here we are a dozen years or so later and the coal fired 1,000 megawatt plant, today would probably be around $1.1, $1.2, maybe $1.3 billion, something like that. But a nuclear plant is about $5 to $6 billion right now.

Now I do not know, have there been any good studies? Is the cost increase there just the price of different designs? Is it due to the level of the safety that we have insisted upon? Let me ask a first question here. Was the Chernobyl plant a standardized design in the Soviet Union?

Mr. ROWDEN. It was one of their standard designs, yes.

Mr. GILINSKY. Yes, yes it was.

Chairman GLENN. Was it a standardized design that they settled upon and then used? The point I am making obvious is that we have stressed safety in this country. We have not hesitated to say move and put new safety devices in the new control rooms. I went through one of our nuclear plants in Ohio last week. I was impressed once again with the complexity of this thing. We went through an emergency drill in the simulator there. I was very impressed with it. They brought some people in and said we are going to throw something at them here, and they took care of it. They have hundreds, literally hundreds, of permutations of things that can happen. But I was impressed once again with the complexity of these things and we have been strong on safety for a very good reason. We want to make sure we did not have a TMI that went to completion, instead of being able to control it.

Now those things may have run up the cost of building a new nuclear plant tremendously. So we have weighed that against the standardized design and have always come up wanting a little bit more emphasis on safety. That is more of a statement than a question.

Mr. ROWDEN. I would like to refer to the French program again. I think with all its differences the analogies are more appropriate to what we are doing in this country than is the Chernobyl Plant and the Russian program.

Chairman GLENN. Chernobyl was a standardized design. They decided this is the best of our technology, and they went with it?

Mr. ROWDEN. Well, I do not know about the best, it was a standardized design.

Mr. GILINSKY. It was essentially a standardized design which they repeated at a number of locations.

Mr. ROWDEN. To achieve their own objectives based on their own standards. The technology in Japan and France on the other hand is basically United States technology standardized. They believe, and I think those who have looked at the process believe, that standardization brings with it very important safety advantages. I would agree with my colleague, Commissioner Asselstine, that the essential ingredient is having an essentially complete design up front so that it can be thoroughly reviewed and the approval means something—not just from the standpoint of regulatory efficiency, but from safety adequacy. But that is the central ethic of standardization as we are developing it.

Chairman GLENN. I do not want to beat the Chernobyl thing to death, but from your knowledge of that and what you have read about it, or what you know about it, was it a design failure or a personnel operations failure?

Mr. ASSELSTINE. A combination, both.

Chairman GLENN. Was it?

Mr. ROWDEN. Both.

Mr. GILINSKY. It certainly involved both, yes.

Mr. BRADFORD. Senator, if I could just mention one question? The $5 to $6 billion figure for the current plants that are coming on line is probably somewhat atypical, that is, these are the problem plants the last that are left. Now, the Seabrooks, the Shorhams.

Chairman GLENN. Well let us cut it back to $4 billion then. You could not build a new plant for under $4 billion, could you?

Mr. BRADFORD. I think your basic point is fair. It is just that if you use something in the range of $3 to $4 billion you would pick up the other plants that we were started in the same generation as these, but finished 4 or 5 years ago. The ones that are left now are the ones that ran into serious trouble.

Chairman GLENN. What has been the major reason for the cost increase?

Mr. **Asselstine**. Mr. Chairman, I think there are several reasons. One reason for current plants is that there were a number of safety improvements imposed in the late 1970's and particularly after the Three Mile Island accident. The fact is, if after an accident you impose a number of changes and improvements and you require that the industry meet those for very legitimate safety reasons within a very short period of time while you are trying to build a plant, that is going to complicate the process. It is going to mean some changes.

I think the second key factor has been the design as you build approach. If you approve the start of construction with a design that is between 12 and 25 percent complete and you are trying to design the plant at the same time that you are trying to build it, something as complex as a nuclear plant, that introduces tremendous complexities and uncertainties. I think that some utilities have been substantially better at managing that kind of a very difficult construction process than others.

I think a third factor were economic decisions. Some utilities made conscious decisions when demand for electricity began to decline to stretch out nuclear construction programs. Nuclear construction programs are large and capital intensive and when interest rates went up the cost of those plants went up rather dramatically. I think in some instances it was poor management of construction. Some utilities were substantially better at managing a difficult construction program than others were. When you look at the ones that fall on the high end of the scale that you mentioned and Peter Bradford mentioned it generally tends to be utilities that did a pretty poor job in terms of overall management of the project.

I think it is a combination of a number of those factors and perhaps some others as well.

Mr. **Rowden**. There have been studies done, Mr. Chairman, on these, obviously from different perspectives. But on the specific question you asked as to what economic benefits could be derived from standardization, if the Chair is interested I can submit for the record a study that was done on this.

Chairman **Glenn**. Well, I do not want to debate this. Mr. Rowden, I would presume that you would not propose that we build plants in this country without any public participation or without public hearings. We should not just say here is our design, it is not open for public discussion or analysis or critique or criticism. I am sure you would not propose that, and yet that is the French system.

Mr. **Rowden**. Well, the French system is a little more complicated than that.

Chairman **Glenn**. Well, there are some very basic faults with it such that we cannot install the French program in this country.

Mr. **Rowden**. They do not have adversarial inquiry of the type that we have—which has its warts as well as its benefits. But I certainly would not propose it for this country. I do not think the industry would support something like that. I do not think the public would stand for it, so it is really not an issue open for debate.

Chairman **Glenn**. Well, I was bringing it up because you mentioned the French and the Japanese experience and in both those cases the public is not cut into the program at all. They are both very undemocratic impositions of what the Government wants to do, period. I do not think we can transpose those systems to this country and expect acceptance of it, particularly with regard to nuclear power plants. That is the point I was making.

Mr. Asselstine, on the stronger chairman's role as opposed to going to a single chairman of the agency, how would you do that? How would you put that in legislation? It seems to me that where you have Commissioners and where you have a chairman, but that chairman is sort of a coordinator of things, it winds up being dependent on a strong personality and a driver in that position more than anything that we can put into the legislation. How would you see that working or how would you legislate a stronger chairman's role?

Mr. ASSELSTINE. Mr. Chairman, I do not disagree with that. I think that to a certain extent it does depend upon the personality of the chairman. His inclination or her inclination to carry that kind of a role. I am not sure that you can mandate it by spelling it out in detail in statutory provisions. But I think if you make it clear that the chairman of the agency is expected to be the day-to-day manager of the staff, that he or she is responsible for the staff's performance in carrying out the decisions that the Commission as a whole makes and you hold the chairman accountable for that performance by the staff, then, I think that sends the message to the chairman that that is the role that he or she is suppose to be playing. I think you can also say that the chairman probably ought to carry out the role of being the initiator or the proposer of policy issues for the Commission. That does not mean that there are not other alternatives, and I certainly would not advocate closing other Commissioners out of the process or denying them full access to information or to the ability of the staff to explore other alternatives.

I think there are ways that you can at least move in that direction and provide the opportunity, but I agree with you, it takes the cooperation of the other members of the Commission and a chairman who realizes that that is the role that is expected of him or her as well. I think that is basically what you have with the Commission right now.

Chairman GLENN. The argument on the other side, against the single administrator is that the old AEC and the people that set this up to begin with thought this was such an important area, obviously, that they wanted a collegial approach to it and they wanted it to be extremely studied. Some names were tossed in here a while ago during the testimony. Mr. Rowden, what if you had James Watts or Ann Burford as a single NRC Administration? What if they were in charge?

Mr. ROWDEN. There are two ways to look at that.

Chairman GLENN. Would you want a safety board to oversee their decisions?

Mr. ROWDEN. Well, let me deal with your first question and just comment. There are two ways to look at that. We had those two individuals. They no longer occupy that office. The political process worked its will.

Chairman GLENN. They were in office quite a while.

Mr. ROWDEN. You have the Commission serving a fixed term without any political accountability. There are different perspectives on those scenarios. My own view is that nuclear regulation is going to continue to be an area of great public and political sensitivity and that the performance of the individual who has responsibility for managing the Nuclear Safety Agency, if indeed that is created, is going to be subject to very, very probing scrutiny both in the political process and in the various agency processes in which the public participates actively. There are procedural safeguards that attend decision-making. I do not think that you are going to have a free booter in there.

If that individual does not measure up to the standards which the Congress has set and which the President expects, that individual should be removable and the heat should be put on the President to remove him. To my way of thinking—and I come back to this again—the most important aspect of single administrator restructuring is to make the President accountable for the performance of the agency. Something which does not exist today.

Chairman GLENN. The NRC was deliberately set up not to do that. To not make it a political agency. That was the purpose in organizing it the way it is, and I generally favor saying you have clear cut lines of authority, clear cut lines of responsibility just as a general principle for all agencies of Government. In this particular instance, I really have not made up my mind yet as to what direction we should proceed on this, because I think this is so important. Let me provide another example that we saw in the early stages of this administration. We had a nuclear policy, export policy and foreign policy that were pretty well set. We had hammered that thing out over some time. Some of you gentlemen were in office when we were doing this in the Carter administration. We debated a year and a half on how we were going to handle our export policy and what our nuclear relations with the rest of the world were going to be. We passed the nuclear non-proliferation act that I was involved with, which originated right in this very room here. We debated that hour after hour after hour, for over a year and a half. This group will remember that and you were part of some of that. Some of you were witnesses, I believe.

We hammered out whether we were going to go with a private nuclear industry expanding around the world or whether we were going to go with a Government to Government relationship. We hoped that we could get relations started with the Soviet Union to the point where maybe we had a chance of getting nuclear weapons scaled down a little bit. At the same time that we were saying please sign up under NPT, we had this policy debate going on. We really hammered that out over a long period of time and it was very tough going. It got very little news publicity. Nobody wanted to talk nuclear non-proliferation. They used to accuse me of bringing up my item again when we would have a press conference. It got to be that kind of thing. There was not that much interest in it. But we really hammered that out over a lengthy period of time. A new administration then came in and it conducted a political 180 degree turn. We were putting out fires all over town for the first year of this administration trying to stop some of the proposals that were being made, proposals that went back to the old idea of the nuclear industry freebooting all over the world.

So the political process does get into this and there apparently had been some promises made in the elective process and during the campaign that the Reagan administration was trying to carry out. We spent the first year of this Administration trying to keep the policy we had. We were pretty reasonably successful. Now all the things that flow from the non-proliferation policy have not all occurred automatically. But we have 137 nations that have now signed up under NPT. I see that as great. I am proud of that, very proud of that and the little part I played in that. Maybe I played a major part in that and I am very proud of that. So that was the route we were going. Now, while we have not gotten all of our problems with the Soviets solved, we can simultaneously say to other nations, please do not go the nuclear weapons route. We are trying to get this thing stuffed back in the bottle a little bit. Not proliferated further. The point I am making is not to brag about what this Committee did or what I did on that issue. But to demonstrate that political agendas do get involved in the nuclear arena. We saw it happen at the beginning of this Administration. I did not like that. They tried to reverse our whole policy. They tried to undercut everything we had done politically and they did this for political reasons. That is the reason I am a little bit hesitant about going to the single administrator that will be a political appointee and have that person serve at the pleasure of the President. I am concerned about the appointment of an Ann Burford and James Watts—if they do not like the policy, it will be a political fight. That is what disturbs me.

I am not necessarily against a single administrator, but if we go that route then we better have somebody over here double checking these things. Someone must be in a position to double check decisions. That must be written into law. That has to be a pretty strong independent check which can respond both back to the President who would be the appointer and to those of us on the Hill here who follow the line to some extent that the original AEC established in making double checks in this extremely important area.

We have been a little bit afield from the purpose of our hearing today here, obviously, with some of the comments about whether we can go to a standardized plant or not. But I could not resist with your expertise here, all of you being here and bringing some of those things up.

In the testimony at our last hearing, the General Accounting Office noted that "limiting the Safety Board's investigation to safety related equipment for a major design construction operations operating on a management deficiency" would preclude investigations of significant problems involving non-safety related equipment. For example, in 1986, a pipe ruptured at Surrey due to corrosion. It injured eight workers in Virginia and four of them later died. Should the jurisdiction of the safety board be expanded to include language such as "for any other incident or event as deemed appropriate by the board." That would allow much more leeway to investigate. I have been concerned that the board is only going to investigate after the accident. I had hoped they would be around double guessing and probing and looking into things so we prevent accidents, rather than go out and investigate them after the crash, like the NTSB does. Do you gentlemen think the structure of the board should be limited or should they be a little more free wheeling than we are providing.

Mr. GILINSKY. I think you ought to leave it up to the board's judgment to decide what they ought to investigate within their budgetary limits.

Chairman GLENN. Do you agree with that?

Mr. ASSELSTINE. Mr. Chairman, I certainly agree with that as well. I think that that is the danger in trying to set these little boxes in the legislation. Something significant can fall outside and then you are in a reactive mode or you are arguing about whether a particular item is fair game.

Mr. ROWDEN. I would have to disagree, Mr. Chairman. If the board is to be an independent board I think the Congress has an obligation to establish the criteria for its investigative jurisdiction. Otherwise you truly will have duplicative regulatory agencies and exacerbate my deep abiding concern.

Mr. BRADFORD. I think if you go in the direction of the single administrator, I think the board has to have the discretion to investigate what it thinks is important. Not only because that is the way a board ought to operate for the reasons you have outlined, but also because if you permit the statute to create the possibility of argument and litigation over its jurisdiction, that in itself will become time consuming.

Chairman GLENN. We will vote and then get back to the last panel here. Let me ask one last question. This does not have anything to do with the organization of NRC either, but I am curious about something. When the United States/Japan agreement was being debated on the Senate floor, Senator Evans placed in the record a rebuttal prepared by you, Mr. Rowden, to a report prepared by the GAO analyzing the agreement. Now, I could not get release of that GAO report. It was not available. I had to call Dante Fascell during the debate even in order to refer to the GAO report, because it had not been officially released at that point, nor were copies in general distribution. Mr. Rowden, who gave you a copy of the report?

Mr. ROWDEN. It was given to me by a member of Senator Evans' staff. It was widely circulating on the Hill. I had not seen it.

Chairman GLENN. Not to me it wasn't, because I tried to get a copy and could not.

Mr. ROWDEN. I can only recount my experience, Senator. I had no secret pipeline into the GAO.

Chairman GLENN. Who was the member of the staff?

Mr. ROWDEN. Senator Evans' Administrative Assistant.

Chairman GLENN. Administrative Assistant, Okay.

Mr. ROWDEN. Phil Jones as I recall.[1]

Chairman GLENN. All right, fine, thank you. Thank you very much, gentlemen. I have to run vote in the last panel. I will get back as fast as I can and the hearing will stand in temporary recess.

[Recess.]

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[1] See p. 250 for a letter from Senator Daniel J. Evans.

Chairman **Glenn**. The hearing will resume. We are glad to welcome our last panel. We appreciate your sticking with us here this morning despite the delay because of the vote and other things. It has truncated our hearing, but we have with us as our last panel Ellyn R. Weiss, General Counsel, Union of Concerned Scientists, Mr. Robert Pollard, Nuclear Safety Engineer, Union of Concerned Scientists; and Edward M. Davis, president of the American Nuclear Energy Council. Mr. Pollard. Is Mr. Pollard here?

Ms. **Weiss**. I am sorry, Mr. Chairman, Mr. Pollard was unable to make it today. I will be presenting the testimony.

Chairman **Glenn**. All right, thank you. Proceed with your testimony, Ms. Weiss, if you would, in either abridged or in its entirety. In either event, the entire statement will be included in the record.

TESTIMONY OF ELLYN R. WEISS, GENERAL COUNSEL, UNION OF CONCERNED SCIENTISTS [1]

Ms. **Weiss**. Thank you, Mr. Chairman. I appreciate the opportunity to come here today and I will abridge the statement.

We applaud the efforts by the Chairman and members of this Committee to address serious problems of the NRC. Measures before this Committee reflect a consensus that the agency today is not functioning in a manner that assures Congress or the American people of the safety of nuclear power plants, or of the integrity of the regulatory process. We believe a package can be fashioned out of the measures before that would improve NRC and being rebuilding public confidence. UCS also strongly believes that reorganization alone is not enough. The problems at the NRC go far deeper than organizational ones. It is our view that the evidence shows that the agency currently lacks the will to address serious safety problems in U.S. nuclear plants.

My written testimony goes into this in some detail and I will not reiterate it orally before you today, but submit it for your consideration. There is no magic bullet or special statutory language or simple management reorganization that would ensure that the NRC treats protecting the public safety as its overriding obligation. We believe that the best hope for enhancing safety lies in creating a better system of checks and balances, improving public participation and increasing Congressional oversight over NRC's rulemaking, standard-setting and general operations.

Certainly part of the problem is institutional. The NRC staff put its official stamp of approval on each currently licensed plant and is responsible for reviewing those few still in the pipeline. To concede that a safety problem was overlooked at any plant raises questions about the safety of may others and about the quality of the agency's own past judgment. This is in practical effect a powerful disincentive to early and open airing of safety issues. Therefore, independent checks and balances are needed to provide a counter weight to this institutional dynamic. The independent Nuclear Safety Board and the Inspector General, if properly set up, help provide that counter weight.

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[1] See p. 150 for Ms. Weiss' prepared statement.

We are concerned that transforming the agency to a single administrator could seriously erode public access to its decision-making, take the public's business even further behind closed doors and increase the already unhealthy dominance of the agency's agenda by the regulated industry. But we have also come to realize the commission system is no panacea either. While the ideal structure for the NRC would probably be a genuinely collegial commission with diverse views and backgrounds, whose members understood that their overriding obligation is to the public safety. It may be too late to revive that. Recognizing this let me address your specific questions.

First you asked about the advantages and drawbacks of the change to a single administrator. The advantages, as you have heard today, are increased efficiency and accountability. The disadvantages are loss of diversity of viewpoints and an erosion of public access to decision-making. Since, as I said, it is our view that the industry already enjoys an unhealthy dominance over the NRC, we find this aspect of the single administrator concept most troubling. If this structure is adopted, we would like to work with the Committee to fashion some means to mitigate this effect. Such as, for example, requiring the administrator to keep a published docket of all matters before him or her for consideration and to maintain publicly accessible files containing the material submitted to the administrator's office in connection with each matter.

Second, you have asked about the proposed relationship of the new agency to the remainder of the Executive Branch. We feel strongly that any agency regulating nuclear power must be free of OMB oversight or control over its safety regulation. The authority to set safety standards free of the cost benefit balancing and other forms of control imposed generally by OMB on other agencies in recent years must stay with the regulatory body, no matter how reconstituted.

Third, you have asked about the proposed mandate, placement, membership and operation of the safety board. This may be the key issue before you. The creation of an independent safety board is a needed reform, whether or not the agency is reorganized to a single administrator. In order to be at all useful the safety board must be truly independent. If it is not independent it would be better not to have it at all. In addition it should have a scope of jurisdiction broad enough to enable it to make recommendations which could prevent accidents, rather than simply conducting after the fact investigations of cause.

In our view the Committee working paper is deficient in both respects. That board is not independent. It is set up within the agency, two of its three members are appointed by the administrator and apparently removable by him or her at will and it must consult with the administrator and provide a written justification to him before it can initiate an investigation. It is nothing more than another arm of the agency. Such a board would not remotely achieve the stated goal of restoring public confidence in this agency, nor would it provide a meaningful balance to the administrator's authority.

In addition, the board may only act if there has been (a) a release of radiation, (b) a major degradation of essential safety-related equipment, or (c) a major deficiency in the design, construction or management controls at a plant. This limits the board to acting either when a very serious accident has already taken place, or when the board knows in detail before an investigation has even begun facts which are not knowable until after an investigation is concluded. Such as precisely what equipment has malfunctioned or the degree to which design construction or management failures were at fault. This threshold is so restricted as to obviate one of the basic purposes of a safety board to identify and investigate precursors so that action may be taken before a serious accident imperils public safety.

Lastly, you have asked about the proposed relationship and powers of the Office of Investigation to the single administrator, the remainder of the agency and the Department of Justice. We believe that the creation of a stable, strong, arms-length investigatory and enforcement arm at NRC is long overdue. This Committee deserves great credit for bringing to light the sorry history of the agency's unceasing efforts to frustrate its own investigators. The provisions of Subtitle X of the Committee Working Paper do not do enough to achieve the necessary reform. We note in particular that the administrator can stop any investigation in its tracks by making an unspecified and generalized determination that public health and safety requires otherwise. I find it difficult to imagine any circumstance where public health and safety would legitimately demand the termination of an investigation. Again, this provision seems designed to bring OI under the control of the administrator.

In conclusion we support the establishment of an independent IG, a strong OI and a truly independent safety board. We recognize some benefits that could be gained from a single administrator. We also hope that this Committee's efforts on structural reform span to a review of the guidelines, standard and regulations which the agency uses to circumvent its public safety mission. Thank you very much.

Chairman Glenn. Thank you, thank you very much.

Mr. Davis.

TESTIMONY OF EDWARD M. DAVIS, PRESIDENT, AMERICAN NUCLEAR ENERGY COUNCIL

Mr. Davis. Mr. Chairman, I appreciate your invitation to appear here today to discuss legislative proposals to restructure the Nuclear Regulatory Commission. My statement is presented on behalf of the American Nuclear Energy Council and the Edison Electric Institute. I would respectfully request that my full statement be inserted in the record.[1]

Chairman Glenn. It will be included in the record.

Mr. Davis. I will try to be as brief as possible, in order to summarize our positions. First I want to underscore certain principles that shape the nuclear industry's position. Foremost among them is the need to assure that any change to the NRC structure is compatible with safety. Coupled with this is a clear recognition that, if we are to have a viable nuclear power program, we must assure that there is an effective credible nuclear regulator. In keeping with those basic precepts then, we urge the following be considered when evaluating organizational proposals.

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[1] See p. 229.

One, modification of NRC's management or office structure should not simply be reactive to problems of the moment. Any changes should be legislated only after thorough consideration of the operational consequences for the agency and for the regulatory program.

Two, there should be no piecemeal approach to organizational change. Proposals addressed to individual NRC offices or functions should be considered in the context of the best overall structure for the agency.

Three, NRC should not be cannibalized. Change should not disperse or dissipate the agency's regulatory resources.

Four, change should not result in duplication of NRC's regulatory functions.

And finally, five, change should not produce confusion of regulatory authority. NRC or any successor agency must be maintained as the sole body responsible for safety regulation. Indeed, the centralization of nuclear regulatory authority, as well as accountability should be the keystone of any regulatory changes.

It is also important to add that many of the problems that have inspired reorganizational proposals were produced by licensing and regulatory process that long ago ceased to match technological capabilities, safety aims and national needs. That process should be formed at the same time Congress tackles organizational change. The needed reforms are well-known and widely endorsed. Standardization, pre-approval of designs and sites, and a consolidated construction permit and operating license process. I am encouraged to hear the Chairman speak favorably towards this standardization concept and would be pleased to offer the Chairman a full review of what the industry has in mind as far as standardization is concerned.

Our engineers tell us that we can bring a nuclear power plant into operation, a standardized nuclear power plant well below $2,000 a kilowatt. So we feel through standardization that we will be able to revitalize the nuclear option. We have had a plethora of standardization hearings in this Congress for the last 7 to 10 years. Some 14 to 20 hearings, and it is time for the Congress to take action to provide the necessary legislative authority.

As far as the proposed organizational changes are concerned, the most sweeping among them would replace the Commission with a new agency headed by a single administrator.

While the full burden of NRC's operational problems cannot be attributed to its management structure alone, there is no avoiding the fact that the agency has been repeatedly frustrated by the evident limitations that that structure imposes. In 1984 and 1985, the Edison Electric Institute commissioned a comprehensive study on the proposed change to a single administrator and I would like to submit that study for the record, if I might.

Chairman **Glenn**. The Committee will accept the study and it will be placed in the Committee files.

Mr. Davis. The principle advantages of a single administrator are improved management, improved and more timely policy formulation and clear accountability. After a long and hard review we in the industry have come to conclude that the present collegial structure of the NRC should be replaced by a single administrator. This position, I hastily add, is not universally held throughout the industry. Some in the industry are concerned about the instability brought about in regulatory policy, brought about by newly incoming administrations that might hold hostile views towards nuclear power. Moreover, we support what I call a pure and simple single administrator. If Congress wishes to add a lot of bells and whistles or checks and balances, if you will, that would usurp or duplicate NRC functions, then our enthusiasm would wane and waiver and our support reconsidered.

I might also recommend several changes to the current legislation that is before the committee. First, we believe that the restructured agency should be headed by two political appointees, the administrator and the deputy administrator. There would be three if you add the IG. All of the directors should remain career officials. We think this is important to assuring apolitical management of the technical staff, and stability in nuclear regulations.

Second there must be appropriate transitional provisions in any legislation in order to assure continuity in agency operation and regulatory functions. Moreover, Congressional intent should be absolutely clear that none of the pending licensing cases for nuclear power plans, particularly those approaching the OL stage should be delayed due to the reorganization and its attendant transition.

Third we are concerned about proposals to grant a fixed term to a single administrator. While we recognize that this proposal has been discussed in the context of enhancing independence of the Nuclear Regulatory Agency, we believe that this proposal raises more problems than it solves. One of the main goals of the proposal to replace the Commission with a single administrator is to focus accountability and responsibility in the administrator and the President who appoints this official. We believe that a fixed term would diminish this accountability. There are a number of other proposals for organizational change to the NRC. We have provided detailed comments on these in our written testimony.

I would like now to focus on the safety board, if I might, briefly.

A number of proposals to establish a Nuclear Safety Board would create a de facto nuclear regulatory commission, with responsibilities that would necessarily entail duplication or dispersal of functions performed by the agency. We believe this to be a seriously mistaken course, and one at odds with the main purpose of the NRC reorganization, the centralization of responsibility and authority for nuclear regulation.

I might had that I am sympathetic to the Chairman's general inclination that there ought to be clear cut lines of authority and responsibility and that should be the main purpose of any reorganization. Thus, we strongly oppose creation of such a board.

Proposals for an independent Nuclear Safety Board are derived from the National Transportation Safety Board or NTSB and its investigation of aircraft accidents. There are, however, pertinent differences between nuclear and aircraft safety regulation. The regulators of the latter, the Department of Transportation and the FAA, and this is an important point, have promotional as well as regulatory responsibilities. Placement of the NTSB in either could therefore foster a promotional perspective that would be inappropriate for any aircraft accident investigation.

Further, the FAA plays and operational role in the Nation's air traffic control system; accordingly, the question of FAA culpability arising from the operational role is a present issue in aircraft accident investigations. Neither, neither of these factors is present in the case of nuclear regulation.

In short, there is no sound functional reason why nuclear safety investigation cannot be discharged effectively, and objectively, by the nuclear regulatory agency.

Establishment of a board that is independent of the regulatory agency would create a situation where a board regulates the regulator that regulates the industry. By the same logic, a similar board should be established to regulate the eight other public health and safety agencies.

We fully support the aim of assuring objectivity in the investigation of nuclear safety events. Realization of that aim enhances the integrity of nuclear safety regulation and protects the legitimate interests of the regulated industry. While we do not believe that a nuclear safety board is necessary for that purpose, if Congress chooses to create such a board, we urge that the following be considered.

That the board be made part of the nuclear regulatory agency. That the board's functions should be confined to investigating fact finding causal determination and reporting thereon. That there be prescribed criteria for triggering safety investigations. Criteria that focus on matters that are truly safety significant. That there be established the office rather than a board, be established an office as a directorate rather than a board. A single directorate would be able to conduct safety investigations with more speed and vigor than a collegial body. And five, we need to assure that the technical resources of the nuclear regulatory agency will not be duplicated or diluted. Such a directorate should have a small professional staff to provide investigation leadership, with the detailing of experts from the regulatory agency or elsewhere to fill particular investigation needs.

I will not go into to further details as far as the present makeup of the board that is incorporated in the Breaux-Simpson bill. It fails to satisfy the criteria that we have laid out. Namely, it is formed as a board and has a very large investigative staff and, therefore, we cannot support the legislation as currently crafted and reported by the Environment Committee.

Mr. Chairman, this concludes my testimony and I stand ready to answer any questions that you might have for me at this time.

Chairman GLENN. Thank you, Mr. Davis. You mentioned a standardization plan that your engineers have had ready to go. Have you ever submitted that to the NRC for their analysis.

Mr. DAVIS. There are presently a number of proposals in various stages before the NRC for certification for standardized designs. General Electric, Combustion Engineering, Westinghouse, all of the major NSSS nuclear steam supply manufacturers have designs pending before the NRC. One of the major impediments is the substantial investment, over $200 million dollars to get a design certified. That is a huge investment with no certainty that it will be recouped.

Chairman GLENN. If we have a single administrator, and if we go to that person as just an arm of the President, how do we keep politics out of the decision-making process? Because politics will get into it. I have seen that myself. You were probably in the room here a while ago when I was talking about how the current administration tried to upset our agreements or nuclear non-proliferation, everything we had worked over a year and a half and debated and debated back and forth. We had many hearings right in this room with the administration and we really weighed very carefully whether our best tact at that time was to really go out and let American industry become involved all over the world and that would have been out of the government's control. The administration wanted business to be our eyes and ears and our method of influence on the world. I felt we should continue to go the government to government route, hoping that we could then use the NPT and sign nations up under that process I will not go through the whole thing. You probably heard it a while ago here. But, then we found the new administration coming and for political reasons. They wanted to reverse the whole policy. Those were political considerations. They were not safe, they were not nuclear non-proliferation considerations. It was reverting back to something we had just debated and settled two years before and that was political. I do not think we want to do that every time there is a change of administration to see things as important as nuclear policy changing. That is the bottom line. How would you prevent a single administrator reporting just to the President, period, and serving strictly at the pleasure of the President, to follow a consistent policy.

Mr. DAVIS. I do not believe you can absolutely keep politics out of any decision-making process. As a matter of fact, you mentioned the issue of nuclear non-proliferation. I remember when we had a five man commission and when President Carter took office, Stu Eisenstat, his domestic policy advisor, wrote the NRC asking that the Commission refrain and terminate the GESMO proceedings, which were on the use of mixed oxide fuels. So even a Commission form of governance for nuclear regulation does not insulate the decision-making process from political manipulation.

Chairman GLENN. No. The point staff makes is that the Commission did not have to listen to Stu Eisenstat either. So maybe it was a protection against doing something that would not have been in the best interest of nuclear policy. Well, if we went that route, it would seem to me that a fixed term immunizes the Chairman perhaps from some of the day-in, day-out politics as we do in our court system. The Supreme Court is a good example, I guess. Across the street over here we say okay, you have your independence you are supposed to make your judgments without fear or favor and we eliminate you from all further politics. We give them a salary. We give them a retirement salary. We give them everything else to keep them independent.

Under what set of factual circumstances would an OI investigation threaten public health and safety? That one still bothers me. The bill states that the administrator could call off an investigation by OI if public health and safety is somehow going to be jeopardized.

Mr. DAVIS. I listened tentatively to the discussion that took place on a preceding panel. The scenario that I would envision would be where you might run into some problems, public health and safety problems. If you did have a significant event, something less than TMI or even an event as serious as TMI, you have to bring the plant to a safe shut down condition. It could be a possibility that the OI investigators would like to quarantine the plant or the equipment to preserve the configuration so to speak for their investigation that would follow.

In this case you would have some tension, some conflict between safety and the pursuit of an independent investigation into its causes. That is one of the scenarios that I can envision where you might have tension between the two missions.

Chairman GLENN. Well, you could, but I think that would be a pretty far-fetched situation where those things really got into serious conflict. You cannot legislate common sense. Somewhere you have to assume common sense is going to prevail. If the plant is still in the process of being brought under control, you are not going to have people quarantining the plant and keeping everybody out and letting the thing go ahead with a melt down. That would just fly in the face of common sense.

Mr. DAVIS. In an emergency or responding to a serious event someone has to be in charge. Someone has to have clear cut authority over OI. I might just urge consideration of the IG model. Even the IG model, no one questions the independence of the IGs. As a matter of fact one has been incorporated in legislation that has been passed by the Senate. The Organic Act as you know, 1978 Organic Act sets up IGs within the agency, reporting to the agency head, and under the agency head's general supervision. I would assume that that type of model would be appropriate for OI.

Chairman GLENN. Ms. Weiss, do you think the safety board, if we set it up the way it is being proposed, should be given a mandate to comment on licensing procedures and regulations? Should it go that far?

Ms. WEISS. Well, I think if the outgrowth of an investigation should be that it comes to be the belief of the board that there is a fault in the rules that may be causing a safety problem or be preventing the Commission from taking action to improve safety, I certainly do not think that they should be barred from pointing out that they should consider changing the rules or procedures.

Chairman GLENN. How broad should the mandate be that the safety board is given? Should it just be to abnormal occurrences?

Ms. WEISS. I tend to believe that language along the lines of significant safety events or precursors and leave it to the board.

Chairman GLENN. Should we define precursors? That interests me. Define precursors.

Ms. WEISS. Well, it would just refer to essentially a near miss. Some equipment failures or human errors that if either prolonged or if aggravated could have led to an accident but were stopped in time.

Chairman GLENN. I never have particularly cared for that. We bring that up as one, but NTSB only gets in after the accident. I would like to give a safety board the option, if they hear there is some faulty procedures or something out of place, to investigate that so we could prevent accidents. How do we prevent accidents? How do we prevent TMI and prevent Chernobyl, and not wait to pick up the pieces after they are over?

Ms. WEISS. I agree with that, Mr. Chairman. I think that the main purpose of the board ought to be to do what they can to prevent accidents. After all if all we want is a group to do autopsies after the event, we can set those up on an ad hoc basis like we did with the Kemeny Commission.

Chairman GLENN. Yes.

Ms. WEISS. The legitimate purpose of the board ought to be to see that we do not get into those situations.

Chairman GLENN. Mr. Davis?

Mr. DAVIS. Just a question. If the board's function is to prevent accidents, what is the new safety agency's function?

Chairman GLENN. Is what, I am sorry?

Mr. DAVIS. If the new board, if the safety board's role is to prevent accidents what is the new safety agency's function?

Chairman GLENN. Both.

Mr. DAVIS. In other words what I am saying, is that the safety agency should be responsible for safety and for the prevention of accidents. As a matter of fact, the current Commission has a significant effort underway, have an organized office. The analysis, evaluation of operating data. It is a huge effort. It is a first class effort, to take a look at operating data, to analyze precursors and to prevent accidents from happening. That is the responsibility of the agency itself, not a board.

Chairman GLENN. In something as important as the conduct of business at a nuclear plant and how it is operated and so on, I just do not see any problem in having a second opinion. If I have a pain in my gizzard or some place, I go get a second opinion before I let the doctor operate on me—and I just think on something like this it is so important.

Mr. DAVIS. I would agree also.

Chairman GLENN. I just do not see any problem. So it takes a few man hours to let somebody come in, look at the records, talk to the crew, do something, what is wrong with that in advance? I do not see anything wrong with it.

Mr. DAVIS. Well the current structure in this Breaux-Simpson bill envisions maintaining it, as an internal advisory committee on reactor safety. If they are not doing their job something ought to be done to reconfigure that rather than creating another commission or another board to do the same thing.

Chairman GLENN. Well, the industry has been relatively safe. I give the industry credit on this. We kill dozens of miners every year mining coal to generate our electricity. But we sure came closer to TMI doing some big damage than we thought than was likely to happen in this country and we want to make sure that that kind of safety record continues. That is what we are trying to do. I am not for reorganizing just to shuffle the deck chairs and hope for something better. If we reorganize I want to make it something where we really do have better and more safe guarantees for the future in the nuclear industry. Otherwise, we might as well forget the whole effort. We have been given this bill from the other Committee, so we are doing our best to try and do what we can to make sure that safety is paramount. That is the bottom line as far as I am concerned.

Ms. Weiss, do you agree with the provision in the bill which would allow the administrator to quash an OI initiated investigation for "public health and safety reasons?"

Ms. WEISS. No, Mr. Chairman. We object to it. I cannot conceive of a situation where that is a real problem. I think the scenario that has been concocted is really far fetched and even at best, that scenario might argue that the investigators go on hold temporarily while whatever is necessary is done to make the plant safe. But it certainly does not argue for termination. We think that that is really an unreasonable restriction. In my view, it does reflect the view of many senior persons on the NRC staff that there is some inherent tension between ensuring safety and enforcing the rules. I do not believe that is true and I think that it would be a mistake to have a provision in the legislation which suggest that that is true and reinforces that view.

Chairman GLENN. Yes. If there ever is a serious nuclear accident, Mr. Davis, would you be concerned about the 55 staff member limit for the safety board? Would that be a limitation on the board's ability?

Mr. DAVIS. If we had a serious accident, 55 probably would not be enough. That is just my point. You are never going to get, the numbers are arbitrary obviously, I do not know if it is too much or too little.

Chairman GLENN. It depends on the nature of the accident.

Mr. DAVIS. There should be a small professional staff that can draw upon the resources of the agency as well as outside. For example, the NTSB model which has been proposed, when there is an accident and the NTSB investigates the accident, they draw upon not only resources within FAA, but outside resources as well. The airline industry and the airline manufacturers as well.

Chairman GLENN. Yes, and I do not want to misrepresent this, but the bill does provide that upon request the administrator can call upon other Federal agencies who I think is the way it is worded, may detail to the board additional personnel. There is no requirement that they have to on request. It seems to me that maybe that might be an advisable change to make, but we will have to look at that one.

If we had a single administrator would you propose any limitations, Mr. Davis, on the industry being able to have ex parte contacts or personal contacts with that administrator?

Mr. DAVIS. I think the same rules would apply. The Administrative Procedures Act and the protections and requirements of the licensing procedures under the Atomic Energy Act. There would be no change to any of those.

Chairman GLENN. Thank you very much. We may have additional questions for you. We would like for you to respond in writing for the record and appreciate your being here this morning. Thank you very much.

Mr. DAVIS. Thank you.

Ms. WEISS. Thank you, Mr. Chairman.

[Whereupon, at 12:31 the Committee adjourned at the call of the Chair.]

APPENDIX

STATEMENT OF THE HONORABLE JOHN BREAUX REGARDING PROPOSALS TO REORGANIZE THE NUCLEAR REGULATORY COMMISSION

APRIL 27, 1988

Mr. Chairman, I am pleased to have this opportunity to testify before you today on an issue that I believe is vital to the future of nuclear power in this country, that is, the need to reform the structure of the regulatory program for the civilian uses of nuclear material.

I sincerely believe, Mr. Chairman, that all of us who are interested in the regulation of nuclear power should share a common goal as we examine the various legislative proposals that are currently pending before both the House and the Senate. That goal, simply stated, should be the promotion of institutions that provide more effective and consistent regulation of the peaceful uses of atomic energy; for it is only through such a regulatory program that the confidence of the American people, in the benefits of this technology, will be restored. We must be successful in this effort if there is any hope that nuclear power will be able to play the crucial role that I believe it must in meeting our future energy needs.

I am well aware that forty years ago, common wisdom held that the regulation of nuclear materials was best left to a Commission, where diversity of opinion and a collegial decision making process would result in actions that the American public could believe represented the very best judgment of a group of "experts".

Of course, in 1946, when the Commission format of regulation was originally devised, the Congress did not want to vest in an agency headed by one person, the further technological development of the awesome power of nuclear energy that we had unleashed against Japan to end World War II.

Ironically, as the Congress decided over the years to split up the defense and the civilian promotional and regulatory responsibilities of the old Atomic Energy Commission, it chose to rid the defense and promotional side of the equation of the supposed benefits of the Commission decision making process. And, to be sure, I sincerely believe that the benefits of a Commission process are largely illusory.

Since I became chairman of the Nuclear Regulation Subcommittee last year, and in the years before that when our distinguished Ranking Member, Senator Simpson, was the Chairman, the Subcommittee has spent a great deal of time investigating the current structure of the NRC. Indeed, with the assistance of two investigators on detail from the General Accounting Office, the Subcommittee held a dozen hearings on various activities of the NRC, including 6 hearings where the structure and functions of the Commission, including allegations of regulatory "coziness" between the Commission and its licensed utilities, were a principal focus. I must confess that I am not terribly pleased by what I have learned.

I think it is fair to say, as we near the conclusion of that investigation, that we have learned that we primarily have both "people" and organizational problems, not technological problems.

The people problems involve some in both the industry and the regulatory community who have failed to maintain a proper perspective and boundary between the regulated and the regulator. I think that because of the efforts of your Committee, as well as ours, we both know the nature of this particular type of problem.

The organizational problems, moreover, are not new and should be familiar to any student of nuclear regulation. Unfortunately, however, I think the people problems tend to get all the news because they are "sexy" and we wind up not focusing the attention we should on the fundamentals.

It should be recalled that during the administrations of both President Kennedy and President Carter (the latter as an outgrowth of its investigation into the root causes of the accident at Three Mile Island) it was determined that serious problems were presented by the Commission format of regulation. The examination of the regulatory structure undertaken by both administrations led to calls for the creation of an agency headed by a single Administrator.

But, the Kennedy initiatives were obviously left uncompleted and, while the Carter Administration's initiatives did succeed in promoting enhanced powers for the Commission's Chairman, they did not make the final step that is the focus of legislative initiatives currently before the Congress. Today, a little more than nine years after the accident at TMI, and two years after the accident at Chernoybl, I hope we can move one step closer to truly modernizing our regulatory structure.

As I stated at a mark-up held by the Environment and Public Works Committee on reform legislation sponsored by myself and Senator Simpson, I believe the record amply demonstrates that the Nuclear Regulatory Commission is a collegial body that rarely makes its most important decisions collegially.

Where, for example, does the record indicate a public decision on the structure and functions of the Commission's Office of Investigation?

Where can we find a public discussion of the Commission's decision regarding the wisdom of surface based testing at candidate repository sites?

Where is the record regarding final decisions by the Commission on its material false statement rules or its enforcement policy statement?

The answers to these questions are found, among other places, from the transcripts of closed meetings, notation vote sheets, and the notes from meetings between the staff of individual Commissioners.

Mr. Chairman, the Nuclear Regulation Subcommittee has conducted an in-depth analysis of NRC decision making over the past three years, and the simple fact is that less than 10 percent of the decisions that have come from the agency during this time frame can be attributed to collegial discussions occurring in an open meeting when a majority of the Commissioners are present. A more cursory examination of the record since 1975 indicates that this pattern is not far from the norm of every Commission during that time frame.

I do not want these remarks to be taken as overly critical of the decision making process, but rather to illustrate the fact that the supposed benefits of the Commission format are not in practice what they are in theory. Indeed, I am not sure that any of us fully expect every step in the decision making process to be made on the public record, although every decision should be based upon the facts contained in the record and in accordance with the law. To expect otherwise would be somewhat hypocritical, given the nature and circumstances surrounding many of our own decisions.

Of course, we here in Congress are accountable to our constituents through the election process, and it is in the area of accountability that I believe the Commission format fails so miserably. Are the Commissioners accountable to the President that appoints them? Generally, unless they are guilty of malfeasance in office, the answer is no, they are not.

Are the Commissioners accountable to an American public that never casts a vote for them? Except in the broadest sense, the answer is again, no.

Are the Commissioners accountable to the Congress, in particular those of us in the Senate who vote on their confirmation? Here, the answer is both yes and no, or, it depends. Absent a broad consensus on a particular legislative or regulatory initiative, it depends, it seems, on how loud we yell at them, and even then, it seems to depend on whether or not we are perceived by them as a threat. This is not the way to promote consistent and effective regulation.

Mr. Chairman, isolated and insulated from both the President and the Congress, and thus from the American people who elect us, the NRC operates almost as if it were in a fourth branch of the government--or a fifth if you count the press, as many people do. Accountability and effective and consistent regulation is one big answer to the problems of this industry. And I, for one, do not believe that effective and consistent regulation is possible within the context of the Commission form of government.

Mr. Chairman, as I indicated earlier, the Committee on Environment and Public Works recently ordered reported, by a unanimous vote, a proposal sponsored by myself and Senator Simpson entitled the Nuclear Regulation Reorganization and Reform Act of 1988. We expect to file our report this week. I would like to take a few moments of the Committee's time and explain for the Members, some of the more important elements of this legislation.

Briefly, the bill is composed of three titles. The first title contains the heart of the reorganization and reform proposals. Subtitle A of title I contains the provisions which establish the new Nuclear Safety Agency as an "independent establishment" within the Executive Branch, and transfers to this new agency all of the powers, duties, and functions of the existing Nuclear Regulatory Commission (NRC).

This new agency differs from the NRC in that it is headed by a single Administrator, nominated by the President and confirmed by the Senate. The agency will also have a Deputy Administrator, chosen in the same manner. Both the Administrator and the Deputy Administrator will serve at the pleasure of the President.

During the mark-up process in our Committee, it was recognized that two additional issues needed to be addressed during our consideration of the bill. Specifically, we determined that we needed to give further thought to, and refine, the exact relationship between this new agency and the President's Office of Management and Budget, as well as the manner in which this new agency would review the licensing of the high-level waste repository application of the Secretary of Energy that we presume will be forthcoming pursuant to the Nuclear Waste Policy Act.

With respect to the first issue, while we wanted the new NSA to be more directly accountable to the President, we also wanted it to retain some of the same independence from the Office of Management and Budget (OMB) as the current NRC. As you know, Mr. Chairman, the current NRC, as an independent regulatory body, is not generally required to submit any information to the OMB except for its budget request. Thus, its testimony before the Congress, its legislative proposals, and its regulations are not subject to Administration review. And, under the provisions of Title 5 of the U.S. Code that normally govern entities classified as "independent establishments" (such as the new NSA) this pattern would be reversed in its entirety.

An amendment adopted by our Committee would allow the new NSA to be treated as other independent establishments with one very important difference. That difference is in the area of regulations. Under this amendment, we propose to maintain the status quo with respect to the promulgation of regulations; that is, we provide that the new NSA is to be treated like the existing NRC with respect to the requirements of the Paperwork Reduction Act, any Executive Order issued pursuant to, or for the purpose of implementing, that Act, and explicitly for the purposes of Executive Orders 12291 and 12498 which detail this Administration's effort to centralize agency rulemaking authorities.

With respect to the second issue, our Committee adopted an amendment that addressed the following concern. Under current law, the Congress chose to vest with the NRC the responsibility for licensing the high-level waste repository. And, since the members of the NRC, while appointed by the President, cannot be removed by the President unless they are guilty of malfeasance in office, a certain independent judgment on the merits of what is ultimately the President's construction application is assured.

However, since the Administrator of the new NSA serves at the pleasure of the President, the following question was posed. What assurance could we give the United State's nuclear utilities and their ratepayers, who are paying for the construction of the repository, as well as the citizens of the State that is ultimately determined to be the potential host of the repository, that this new agency would provide a judgment about the candidate site unfettered of the intense political pressures that are surely to be exerted at this later point in time, when billions of dollars have been spent in the evaluation process?

Under the amendment adopted by our Committee, the Administrator of the NSA is required to create a special licensing board of three members, once the siting decision is finalized by the President, or the Congress in the event that a State exercises its veto rights under the Nuclear Waste Policy Act.

One member of the panel will be chosen from the existing pool of talent in the Atomic Safety Licensing and Appeals Board (ASLAB), to ensure that the board has an individual experienced in administrative law. The remaining two members of this board would be chosen from a candidate pool of six individuals nominated by the members of the Nuclear Waste Technical Review Board, an independent group of individuals created by the latest amendments to the Nuclear Waste Policy Act, and who will be extremely familiar with the key technical issues that are going to be the battleground of the licensing proceeding. All of the members so selected will serve for the duration of the proceeding which, according to the Nuclear Waste Policy Act, is to take no more than three years.

Finally, borrowing upon the model that exists within the adjudicatory structure of the Department of Transportation, the amendment provides that the decision of the special licensing board, along with any interlocutory appeals handled by an agency appellate panel that might be utilized by the Administrator, is to be either affirmed by the Administrator or remanded for further action if it is determined not to be based upon substantial evidence on the record.

Mr. Chairman, Subtitle B of title I amends the Inspector General Act of 1978 and creates a statutory Office of Inspector General for the new NSA. This office, which will be headed by a Presidentially appointed, Senate confirmed, individual will assume the functions of the existing Commission's Office of Inspector and Auditor. These functions are the normal independent investigation of "in-house" waste, fraud, and abuse as more fully set out in the 1978 Inspector General law. I would note that these provisions are identical to provisions contained in your bill, S. 908, that unanimously passed the Senate earlier this year. Those of you who have read the report of the "Williams Investigation" into the NRC well know the need for this treatment of that function.

Subtitle C of title I creates a "new" Office of Investigations within the NSA, to be headed by an Assistant Administrator selected by the Administrator. In this respect, the Office will have equal status with other major program offices within the NRC that are also transferred over to the new NSA and headed by Assistant Administrators chosen by the Administrator (Office of Nuclear Reactor Regulation, Office of Research, and Office of Nuclear Materials).

For the benefit of those Members who have not followed the recent controversies surrounding this function closely, the role of independent investigations of NRC licensees for potentially criminal wrong-doing has been hotly debated both within the existing Commission and here on the Hill, almost from the inception of that function in 1982.

Briefly, the Commission determined in 1982 that the then current practice of allowing its inspection and enforcement office to also conduct criminal type investigations was inadequate, largely due to the differences between the two different types of investigations. At that time, the Commission created a separate Office of Investigations, reporting directly to the Commission.

For a variety of reasons, there developed over the ensuing years a strain between the investigative and regulatory staff, principally revolving around two fundamentally different philosophies regarding the role of criminal investigations in the fulfillment of the Commission's health and safety mandate. Put quite simply, one school of thought held that criminal investigations should be vigorously pursued, almost notwithstanding the immediate regulatory considerations confronting the staff. Another school of thought held that criminal investigations were almost secondary to regulatory considerations.

And, while a number of "experimental" initiatives have sought to exert "management" controls over the independent investigative function since 1982, in every such instance, until just recently, the Commission, upon reconsideration, has determined that the system established in 1982 was just fine.

However, in the Statement of Managers accompanying the recently passed Continuing Resolution for FY '88, language was included that directed the Commission to put this investigative function under the regulatory staff. Unfortunately, I believe, the Commission decided to follow this non-binding recommendation, and on February 1 of this year, transferred the Office of Investigations so that it now reports to, and is the responsibility of, the Deputy Executive Director for Operations.

Mr. Chairman, I know that many Members of this Committee were as upset as the Members of our Committee with this action, and through this section of the bill we propose to re-establish this Office and function to its status quo ante.

Subtitle D of title I establishes an independent Nuclear Reactor Safety Investigations Board within the NSA. This board, which combines the precepts of the National Transportation Safety Board, the Chemical Safety Board included by the Environment and Public Works Committee in its Clean Air bill, and legislation introduced by Senator Biden, would be charged with the responsibility of conducting independent investigations of certain categories of incidents that occur at nuclear plants and making recommendations to the Administrator of the NSA on steps that it believes should be taken to avoid a similar incident in the future.

Briefly, the Board would be headed by an individual nominated by the President and confirmed by the Senate. The other two members of the Board would be chosen by the Administrator of the NSA. All three Board members would have to meet the qualifications criteria contained in the bill, and once appointed would serve three year terms. Members of the Board could only be removed by the President, and only if found to be guilty of inefficiency, neglect of duty, or malfeasance of office.

Mr. Chairman, as you might have heard, this feature of the bill has been one of its more controversial pieces. It has been equally criticized by both representatives of the industry and the environmental community, which might be enough of an indication that it is a pretty sound piece. However, I believe that these provisions are meritorious notwithstanding the political equation.

I would, moreover, like to take a minute or two to address some of the concerns that have been raised about these provisions. First, some have argued that the Administrator of the NSA will, in fact, control the operations of the Safety Board because of the fact that he or she will appoint two of the three members. In response, I would note that the legislation vests the executive functions of the Board in the Chairman, who as I earlier stated would be an individual nominated by the President and confirmed by the Senate. More importantly, I would argue that the set terms and limited removal authority that apply to the Board members are the key to ensuring independence.

Secondly, I would reiterate what I believe to be the clear language of our bill. The Safety Board, and not the NSA, is the final authority as to whether an event meets the threshold of the bill in terms of a "significant safety event" that requires independent investigation. Nothing else in these provisions, including the requirement that the Board and the Administrator consult with one another before launching an investigation should be construed to arrive at a different result. This latter requirement is simply a legislative statement that we want these two entities to talk to one another about what is going on out in the real world. Although one might not normally think that such a legislative direction is necessary, the recent Williams report on the operations of the NRC gives ample justification for this type of requirement.

Third, although the budget for the Safety Board is a part of the NSA budget, we have created a separate line item for this new entity and any reprogramming of funds by the Administrator of the NSA would be subject to the same rules as apply to any other line item in the agency's budget. Currently, that requires any shifting of funds within budget line items in excess of $500,000 to be submitted to the Congress for 30 session days of review and action. If we disapprove of such reprogramming within that time frame, obviously no shift could occur.

Mr. Chairman, I do not believe that any other elements of the bill ordered reported by the Environment and Public Works Committee require comment at this time. Moreover, while I know that this hearing was designed to address the need for reform generally, I thought it would be useful to give you our perspective on this issue and to urge you to join us in this opportunity to reform the structure of the NRC. I would, of course, be more than willing to respond to Members questions.

Statement of
J. Dexter Peach, Assistant Comptroller General
Resources, Community, and Economic Development
Division

Mr. Chairman and Members of the Committee:

We appreciate the opportunity to present our views on the proposed legislation to establish a Nuclear Safety Agency to assume the functions of the Nuclear Regulatory Commission (NRC). My testimony today will focus on an unnumbered draft bill reported by the Senate Committee on Environment and Public Works on March 29, 1988. The structure proposed would make one individual--the administrator--accountable for nuclear regulation and would provide a system of checks and balances through the creation of an Inspector General and a Nuclear Reactor Safety Investigations Board to ensure that programmatic, technical, and public health and safety issues are adequately addressed.

In general, we support the move to a single administrator to oversee nuclear regulation and the creation of an Inspector General and a Nuclear Reactor Safety Investigations Board. However, we see no need for an Assistant Administrator for Investigations. In addition, we have some specific observations and suggestions regarding the need to (1) provide specific criteria concerning the activities that would prompt an investigation by the Board, and (2) leave in place important panels and committees, such as the Advisory Committee on Reactor Safeguards and Atomic Safety and Licensing Board Panel, to provide the administrator expertise and advice on technical issues.

Our position on NRC's organizational structure has evolved over the past several years as the nuclear regulatory environment has changed. In the aftermath of Three Mile Island, we concluded that the commission form, with a strong Chairman, was more appropriate for resolving long-term nuclear policy decisions. We believed then, and still do, that a single administrator could respond in a more timely and efficient manner to day-to-day regulatory problems and decisions. Since 1980, the Congress or NRC have largely addressed many of the long-term issues. And, NRC now concentrates most of its efforts on overseeing the safe, day-to-day operation of plants rather than approving license applications. Given this shift, we believe the time is right to change to an agency headed by a single administrator, thereby pinpointing accountability for effective regulation of nuclear activities and operations.

As you know, Mr. Chairman, we have supported the need for an Inspector General at NRC since 1981. We reiterated our position before this Committee last year when you considered amendments to the Inspector General Act. We will continue to support the need for an Inspector General regardless of NRC's organizational structure.

Last year we also outlined for you five elements for an oversight board for the Department of Energy's (DOE) nuclear facilities. Similar elements--independence, technical expertise, ability to determine the scope of work, authority to report findings to the agency head, and public access to the findings--should also apply to the Nuclear Reactor Safety Investigations Board. Although the proposed Board meets several of the elements, it does not fully meet those involving independence and the ability to determine the scope of work.

Further, because the bill would transfer to the new agency most of NRC's functions, it appears to contemplate that existing panels and committees, such as the Atomic Safety and Licensing Board Panel and Advisory Committee on Reactor Safeguards, would remain in existence. Such panels become even more important in a regulatory agency headed by a single administrator to ensure that the administrator receives a broad range of technical advice. Therefore, the bill should clearly state that the panels and committees would remain after the transfer of functions occur.

Let me briefly describe NRC's organizational structure, the principal features of the proposed legislation, and our views on the benefits of a single administrator, Inspector General, and the Board. In addition, we will offer some observations to help ensure the benefits are obtained and clarifications for specific provisions of the bill (app. I lists the clarifications).

NRC'S ORGANIZATIONAL STRUCTURE

Under the Atomic Energy Act, NRC regulates the construction and operation of nuclear plants and issues regulations to ensure they do not pose undue public health and safety risks. To carry out its regulatory responsibilities, NRC develops policies, standards, and guides as prescribed by the agency's five commissioners. The commissioners are nominated by the President and confirmed by the Senate for a 5-year term; the President appoints one commissioner as chairman.

The chairman is responsible for (1) preparing policies and guidance for the commission's consideration, (2) conducting administrative, organizational, budgetary, and certain personnel functions, and (3) setting rulemaking, research and development, and other priorities. The collegial commission is responsible for policymaking, rulemaking, and licensing; the Chairman does not have a preeminent vote in these matters.

The commissioners have four staff offices and three advisory committees to assist them. In addition, NRC has an Executive Director for Operations who supervises and coordinates policy development and operational activities of the agency's staff and implements commission policy directives.

PRINCIPAL FEATURES OF THE PROPOSED LEGISLATION

On March 29, 1988, the Senate Committee on Environment and Public Works, reported out an unnumbered bill, Nuclear Regulation

Reorganization and Reform Act of 1988. The legislation proposes to transfer NRC's existing functions to the Nuclear Safety Agency as well as all rules, regulations, policies, and advisory panels and committees in place on the date of enactment. The agency would be headed by an administrator and deputy administrator, both appointed by the President and confirmed by the Senate. The bill would also establish an Office of Inspector General, an Assistant Administrator for Investigations, and a Nuclear Reactor Safety Investigations Board. The Board would investigate significant safety events defined as a (1) moderate exposure to, or release of, radioactive material, (2) major degradation of essential safety-related equipment, or (3) major design, construction, operating, or management deficiency.

GAO'S VIEWS ON THE PROPOSED LEGISLATION

We would like to discuss our views on this proposal and suggest some modifications for your consideration.

Single Administrator

Over the last several years, we have compared the commission and single administrator structure for several federal agencies, including NRC, the Federal Communications Commission, and the Consumer Product Safety Commission. The conclusions we reached varied with the responsibilities of the affected agency and the status of its regulatory posture at the time.

For example, in April 1987 we concluded that the Consumer Product Safety Commission's functions could more effectively be carried out by a single administrator because some basic assumptions about the need to have commissions--stability, insulation from political pressures, and diversity of viewpoints--had not been realized.[1] We also noted that seven of eight other regulatory agencies concerned with public health and safety were headed by a single administrator. NRC was the exception.

We believe that nuclear regulation too could benefit from such a change. Our position has evolved over time. In January 1980 we found that the commission failed to provide leadership and direction to the staff and permitted the staff to decide when new policies were needed. Nevertheless, we concluded that, if the Chairman's and Executive Director's roles were strengthened, the commission structure offered a distinct advantage for resolving long-term policy decisions concerning such issues as nuclear waste, decommissioning, and breeder reactor deployment.[2] At the same time, we recognized that a single administrator could respond in a more timely, efficient manner to day-to-day nuclear regulatory decisions.

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[1] Consumer Product Safety Commission: Administrative Structure Could Benefit From Change (GAO/HRD-87-47, Apr. 9, 1987).

[2] The Nuclear Regulatory Commission: More Aggressive Leadership Needed (EMD-80-17, Jan. 15, 1980).

Shortly thereafter, the President submitted to the Congress an NRC reorganization plan that better defined the Chairman's role and addressed other concerns we highlighted. The plan gave the commissioners responsibility for policy formulation, rulemaking, and licensing and allowed the Chairman to clearly define the Executive Director's role. However, the commission continues to rely on the staff to decide how policies should be written and has been slow to take decisive action. For example, the commission took 4 years to amend its backfit regulations, and for more than 10 years has been in the process of revising its decommissioning rule.

In addition, over the last 8 years, the nuclear regulation environment has changed. First, many of NRC's regulatory policies have been established and tested. Second, the Congress and/or NRC have largely addressed many of the long-term nuclear safety policy issues. Third, NRC's regulatory emphasis has changed from primarily approving license applications to ensuring the safe, day-to-day operation of 109 plants. Finally, a growing perception exists among the Congress, nuclear utility industry, and public that the commission is indecisive, takes too long to effect change, limits the staff's effectiveness because they can receive directions from at least five individuals, and is too often an industry advocate rather than a regulator.

As a result, over the last several years the Congress has considered a number of legislative proposals to strengthen NRC's regulatory stance; now the Congress is considering legislation to change the nuclear regulatory structure. Because of the change in nuclear regulatory emphasis and the desirability of having a single administrator accountable for overseeing the operation of nuclear power plants and other licensed activities, we support the change to a single administrator. However, we believe that the administrator would benefit by having access to the technical expertise and advice of the Atomic Safety and Licensing Board Panel and the Advisory Committee on Reactor Safeguards. Therefore, we suggest that the bill clearly state that existing panels and committees would continue after the transfer of functions occurs.

Let me now briefly summarize two reports that demonstrate that the commission's slowness and/or indecisiveness in addressing nuclear power plant safety issues. Appendix II lists some other reports we have issued.

Efforts to Ensure Nuclear Power Plant Safety Can Be Strengthened (GAO/RCED-87-141, Aug. 13, 1987)

In this report, we found that NRC's safety standards do not, nor are they required by the Atomic Energy Act to, eliminate all risks associated with plant operations. Although NRC recognizes that the plants pose some risk to public health and safety and uses a number of mechanisms to minimize the risk, NRC has taken from several months to 10 or more years to identify and approve a solution for problems that are common to several or a class of plants. In addition, over the years NRC has identified more possible safety problems than it has resolved. We concluded that the longer these issues are unresolved, thereby precluding NRC from improving its safety standards, the longer plants may operate in a less safe manner.

We also found that NRC identified five plants with chronic safety problems but was slow to require effective corrective action. As a result, four plants continued to operate until either an incident occurred that forced a shut down or the utility stopped operations to correct the problems. We believe this occurs because NRC lacks guidelines to alert the industry that plants would be shut down when safety or management problems approach a specified threshold. Therefore, we recommended that NRC develop guidelines to use as a framework to decide the types and/or degree of safety problems that constitute undue risk such that NRC would consider shutting a plant down. NRC disagreed with this recommendation.

Action Needed to Ensure That Utilities Monitor and Repair Pipe Damage (GAO/RCED-88-73, Mar. 18, 1988)

In part, this report shows that an unexpected event in non-safety-related equipment can adversely affect important plant safety systems. In December 1986, a pipe rupture at Virginia Electric and Power Company's Surry Unit 2 nuclear power plant injured eight workers; four subsequently died. Virginia Power concluded that the cause of the accident was erosion/corrosion caused by fluid passing through pipes at high temperature, pressure, and speed during the 14 years the plant had been in service. The accident occurred in the portion of the plant not regulated by NRC, but its effects cascaded across several regulated systems causing additional accident management problems.

Until this accident, NRC did not focus attention on erosion/corrosion in the non-safety-related portion of nuclear plants. Since that time, NRC has required utilities to report on the extent of known erosion/corrosion in each plant. As of January 1988, NRC had identified 34 plants--about 30 percent of those with operating licenses--that have some erosion/corrosion damage in both the safety and non-safety-related portions of the plant. Despite these findings, NRC staff plan to gather additional information and decide during the summer of 1988 whether they should recommend that the commission take additional regulatory action. Even then, however, the staff do not know if the commission will address this issue or the extent of the action it may take.

We believe that NRC should ensure that utilities assess the integrity of all pipe systems. As a result, we recommended that NRC require utilities to (1) inspect all plants to determine the extent of erosion/corrosion, (2) replace pipe that does not meet the industry's minimum standards, and (3) periodically assess the spread of erosion/corrosion in the plants. NRC received this report on April 1, 1988; therefore, we do not know what, if any, action it may take.

Office of Inspector General

As early as 1981, we supported the need for an Inspector General at NRC to ensure that the Congress and the commissioners receive objective information on problems within NRC and to enhance public trust in the regulation of commerical nuclear power.[3] Last year, Mr. Chairman, your committee debated amendments to the Inspector General Act, which proposed to create such offices within four agencies, including NRC. A representative from our Accounting and Financial Management Division reiterated our support for creating an Inspector General in NRC.

The Congress intended for Inspectors General to have the requisite independence to do an effective job. They are appointed by the President and confirmed by the Senate. Although an Inspector General reports to, and is under the general supervision of, the agency head, the agency head cannot prohibit, prevent, or limit the Inspector General from undertaking or completing any audit or investigation the Inspector General deems necessary. The

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[3] Improvements Needed In The Nuclear Regulatory Commission's Office of Inspector and Auditor (EMD-81-72, July 9, 1981).

Inspector General can evaluate agency performance; combat fraud, waste, abuse, and mismanagement; and ensure that the Congress and the agency head receive objective information on problems. In addition, the Inspector General Act provides that this office shall have an assistant inspector general for audits and one for investigations.

In this case, the bill proposes two separate offices: an Office of Inspector General and an Assistant Administrator for Investigations. From our point of view, we see no need for a separate Assistant Administrator for Investigations. As set out in the proposed legislation, this office would investigate allegations bearing on the integrity of agency proceedings and practices and ensure licensee compliance with rules, regulations, and the terms of their licenses. However, the Office of Inspector General can investigate allegations bearing the agency's integrity, such as the recent cases concerning possible collusion between NRC and licensee employees. Moreover, the agency's staff inspect licensees to ensure regulatory compliance. Since the functions of the Assistant Administrator for Investigations as proposed by the bill would appear to duplicate the work of the Inspector General and agency staff, we would suggest deleting section 131 from the bill and making it clear that the Inspector General can investigate allegations of wrongdoing by agency employees, contractors, and licensees.

Nuclear Reactor Safety Investigations Board

As proposed, the Board would consist of three members including a chairperson appointed by the President and confirmed by the Senate; the administrator would select the other two members. The members would be appointed for 3 years. In addition, the Board would be authorized a staff of 55 people and an annual appropriations of $5.5 million. It would cease to function at the end of fiscal year 1993.

Last year we testified before this Committee on the key elements for a safety board to independently oversee DOE's nuclear weapons facilities. Although the Board proposed here would differ from that proposed for DOE, it should have similar, key elements: independence, technical expertise, ability to determine the scope of work undertaken, authority to report its findings and recommendations to the agency head, and public access to the findings and recommendations made and the agency's response to them. We do not believe the Board fully meets the independence and ability to determine the scope of work elements. Our rationale and a discussion of the importance of each element follow.

Independence

In our opinion, to be independent the Board must not rely on the agency for funds and resources and should be free to pursue issues to their logical conclusions for all of the agency's public health and safety activities. The Board in the proposed legislation would be part of the agency, and the bill contemplates funding the Board's activities by a line item appropriation, separate from the agency's appropriation. However, the legislation would allow the administrator to select two Board members from the private sector or the agency staff. With the administrator selecting two members, some of the Board's independence could be compromised. Therefore, we do not believe the Board fully meets the independence element. To alleviate this concern, the Committee could require that the President appoint and the Senate confirm the three Board members; this would be consistent with the method used, for example, to appoint members to the National Transportation Safety Board.

Technical Expertise

Technical expertise is needed to ensure that the Board does not rely solely on agency or licensee information when conducting its activities and/or developing its findings and recommendations. Further, the Board should understand the various activities licensed by the agency, as well as the public health and safety ramifications of the operations conducted. To do this, the Board should obtain or acquire technical expertise in a number of areas, such as nuclear safety technology, operations and maintenance, and human factors. The Board should also draw on expertise available through DOE's national laboratories and NRC's existing panels, boards, and committees, such as the Advisory Committee on Reactor Safeguards.

The proposed legislation provides that the Board have the necessary technical expertise to perform the functions established. For example, the bill states that the members "shall be appointed on the basis of technical qualification, professional standing, and demonstrated competence and knowledge . . . ." The bill also states that the Board may obtain assistance from any federal or state agency. Therefore, we believe it meets the technical expertise element.

Ability to Determine the Scope of Work

Within the criteria established for the conduct of the Board's activities, it should not be restricted in the scope of work undertaken. The Board should be able to immediately respond to safety issues that arise as well as non-safety-related issues that could challenge safety systems and potentially endanger public health and safety. The Board must also be given clear access to licensed facilities and records to ensure that it can conduct timely and complete assessments.

The legislation would allow the Board access to the facility where the event occurred and all information relevant to the investigation conducted and give it authority to hold hearings and subpeona witnesses for the hearings. Further, the Board would not be limited in the scope of investigations for a significant safety event as defined in the proposed bill.

Although the definition is broad, it would limit a significant safety event to degradation of safety-related equipment or a major design, construction, operating, or management deficiency. The accident at Surry demonstrated that degradation of non-safety-related equipment can challenge important plant safety systems and did not result from a major design or construction deficiency. Under the definition proposed, this incident may not be considered significant.

In addition, the bill does not require the Board to set out criteria that defines the circumstances under which it would exercise its responsibilities or the mechanism that the Board would use to identify events that it should investigate. Rather, the bill states that prior to the start of an investigation, the Board would consult with the administrator and then set forth in writing the Board's rationale for determining that an event meets the bill's definition.

In our opinion, Mr. Chairman, the Board should, within a specified time after enactment, develop--and make available for public review and comment--criteria setting out the scope of its authority under the act and the mechanism it will use to identify events subject to its authority. Having criteria in place would help ensure that the Board would not have to consult with the administrator and could respond rapidly and consistently in the conduct of its activities. For these reasons and because we have some concerns about another provision (section 143(b)), which we discuss in appendix I, we do not believe the Board meets this element.

Authority to Report Findings and Recommendations to the Agency Head

The Board should have authority to report its findings to the agency head to ensure that the agency head seriously considers and acts on the findings and recommendations made. The agency head should respond in writing within a specified period to the actions it has taken or plans to take on the Board's findings and recommendations. If the agency head cannot implement the recommendations made, he or she should so notify the Board and provide the rationale for not doing so.

The proposed legislation would require the Board to submit its findings and recommendations to the administrator. The administrator then must provide a written report to the Board setting out the specific actions taken or planned for each of the recommendations or explaining why it is not feasible to take the action recommended. Therefore, we believe the Board satisfies the reporting authority element.

Public Access to the Findings and Recommendations

The Board's findings and recommendations and the agency's response to them should be sent to the Congress and be made available to the public. This element is important because it provides the Congress and the public a better understanding of the issues facing the agency and its licensees. The legislation states that the Board would submit its findings to the administrator and the Congress and would issue an annual report that addresses the (1) significant safety events investigated and (2) recommendations made and the administrator's response to each recommendation. It would also require that the annual reports be made available to other federal, state, or local government agencies and, upon request, to the public. Therefore, we believe it satisfies the public access element.

In closing, Mr. Chairman, let me reiterate that times have changed and our position on NRC's structure has evolved. Further, the Congress and the public are exhibiting an increasing lack of confidence in NRC as an effective regulator and protector of public health and safety. We support the need to place nuclear regulation under a single administrator and create an Inspector General and Safety Investigations Board. Taken together--the single administrator, Inspector General, and Board--ensure accountability, independent oversight, and a system of checks and balances for the agency and the activities regulated. Further, we believe it is particularly important that the single administrator receive input on highly technical and complex regulatory issues from expert groups, such as the Advisory Committee on Reactor Safeguards and Atomic Safety and Licensing Board Panel, and urge that the legislation provide for their continuation.

We hope our views and suggestions are useful to you in the legislative process. We would be pleased to respond to any questions you or the Members of the Committee may have.

SUGGESTED CHANGES FOR THE PROPOSED NUCLEAR REGULATION REORGANIZATION AND REFORM ACT OF 1988

(Unnumbered draft legislation)

-- Section 143(b) - This provision might allow the administrator to limit the scope of investigative activities undertaken. It states that "any employee of the Board, . . . may do all things appropriate for a proper investigation." As written, the administrator might argue that a proposed Board activity is not appropriate for a particular investigation. Since the Board should have the authority to determine what is appropriate, the Committee may wish to redraft this provision as follows: "any employee of the Board, . . . may do all things the Board deems appropriate for a proper investigation."

-- Section 143(a)(1) - This provision states that the Nuclear Reactor Safety Board would investigate significant safety events arising out of activities licensed under section 103 or 104 of the Atomic Energy Act. Although section 103 applies to commercial reactors, section 104 applies to licenses for the possession and use of radioactive material for medical therapy and research and development activities. We believe the latter activities should be within the Board's purview, but the Committee may want to delete the word "reactor" from the Board's title.

-- Section 103(a) - This provision would establish a Nuclear Safety Agency. If the acronym NSA were used, we believe some confusion could arise since another agency has the same acronym. Therefore, the Committee may want to consider alternatives, such as Nuclear Regulatory Agency, Atomic Regulatory Agency, Atomic Energy Regulatory Agency, or Nuclear Licensing and Regulatory Agency.

-- Section 303 - This provision states that greater than Class C radioactive waste should be stored or disposed only in a commercial or government facility licensed by the Nuclear Safety Agency. Under the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1980 (Public Law 96-164), DOE's Waste Isolation Pilot Plant (WIPP), a geological repository for the permanent disposal of similar type of defense waste, is exempt from NRC licensing. The licensing requirements in the proposed legislation would appear to preclude use of WIPP to store commercial Class C waste.

SELECTED GAO REPORTS ON NRC

Nuclear Regulation: Action Needed to Ensure That Utilities Monitor and Repair Pipe Damage (GAO/RCED-88-73, 03/18/88)

Nuclear Regulation: Efforts to Ensure Nuclear Power Plant Safety Can Be Strengthened (GAO/RCED-87-141, 08/13/87)

Nuclear Regulation: A Perspective on Liability Protection for a Nuclear Plant Accident (GAO/RCED-87-124, 06/02/87)

Nuclear Regulation: Oversight of Quality Assurance at Nuclear Power Plants Needs Improvement (GAO/RCED-86-41, 01/23/86)

Information on Certain Aspects of TVA's Nuclear Power Program (GAO/RCED-86-72FS, 01/08/86)

Nuclear Regulation: Process For Backfitting Changes in Nuclear Plants Has Improved (GAO/RCED-86-27, 12/24/85)

Concerns Regarding the Nuclear Regulatory Commission's Implementation of the Freedom of Information Act (GAO/RCED-85-101, 04/25/85)

Further Actions Needed to Improve Emergency Preparedness Around Nuclear Powerplants (GAO/RCED-84-43, 08/01/84)

Nuclear Safety Research Responsiveness to Regulatory Needs and Coordination (GAO/RCED-84-15, 11/15/83)

Response to Questions Raised Concerning the TMI-2 Cleanup Schedule and Cost (GAO/EMD-82-90, 07/20/82)

Greater Commitment Needed to Solve Continuing Problems at Three Mile Island (GAO/EMD-81-106, 08/26/81)

Improvements Needed in the Nuclear Regulatory Commission's Office of Inspector and Auditor (GAO/EMD-81-72, 07/09/81)

Further Evaluation of the Proposed Interim Consolidation of the Nuclear Regulatory Commission (GAO/EMD-81-76, 06/24/81)

The Nuclear Regulatory Commission Should Specify User Needs and Improve Cost Control for its Document Control System (GAO/EMD-81-90, 06/03/81)

The Effects of Regulation on the Electric Utility Industry (GAO/EMD-81-35, 03/02/81)

Electric Power Plant Cancellations and Delays (GAO/EMD-81-25, 12/08/80)

Economic Impact of Closing the Indian Point Nuclear Facility (GAO/EMD-81-3, 11/07/80)

The Nuclear Regulatory Commission's Handling of Allegations of Defective Cable (GAO/EMD-80-115, 09/17/80)

Proposed Interim Consolidation of the Nuclear Regulatory Commission (GAO/EMD-80-118, 09/11/80)

Three Mile Island: The Financial Fallout (GAO/EMD-80-89, 07/07/80)

Existing Nuclear Sites Can Be Used for New Power Plants and Nuclear Waste Storage (GAO/EMD-80-67, 04/01/80)

The Nuclear Regulatory Commission: More Aggressive Leadership Needed (GAO/EMD-80-17, 01/15/80)

SUBMITTED BY THE
UNITED STATES NUCLEAR REGULATORY COMMISSION
PRESENTED BY
LANDO W. ZECH, JR.
CHAIRMAN

Mr. Chairman, Members of the Subcommittee, my fellow Commissioners and I are pleased to appear before you today to discuss Title I of the Nuclear Regulation Reorganization and Reform Act of 1988, as ordered reported by the Senate Committee on Environment and Public Works. This proposed legislation would replace the Commission with an agency headed by a single administrator, establish an independent Nuclear Reactor Safety Investigations Board within the restructured agency, establish a statutory Inspector General, and provide for a statutory Office of Investigations that would report to the single administrator.

Before addressing this specific bill, I will set forth the Commission's position on restructuring the NRC.

Single Administrator

With respect to whether the NRC should be restructured as an independent agency headed by a single administrator, a majority of the Commission supports the single administrator concept.

In recent years there have been several independent examinations of the structure of the Commission. Following the Three Mile Island accident, both the Kemeny Commission and the Rogovin Special Inquiry Group recommended in 1979 that the NRC be headed by a single administrator. In a strongly worded statement, the Kemeny Commission declared that "as presently constituted, the

NRC does not possess the organization and management capabilities necessary for the effective pursuit of safety goals." The Rogovin Inquiry Group concluded that "the central and overwhelming need is for legislative and executive reorganization to establish a single chief executive with the clear authority to supervise and direct the entire NRC staff."

In response to these recommendations, the President prepared and the Congress did not object to Reorganization Plan No. 1 of 1980. That Plan vests additional executive authority in the Chairman. Subsequently, the Grace Commission recommended that Congress enact legislation which would further strengthen the authority of the Chairman as the chief executive officer of the Agency. However, no legislation was passed to implement the Grace Commission recommendations.

In large part the central focus of the discussion on the structure of the NRC is whether the public is better served by an organization where important decisions are made through a collegial process or by an agency headed by a single decision-maker. In addressing this issue the Rogovin Inquiry Group stated, "there is not an agency in government that would not better provide for a diversity of views if it were headed by a Commission. It is not likely, however, that any of these agencies would be as well managed."

In 1954 when Congress enacted the Atomic Energy Act, one of the primary mandates of the Atomic Energy Commission was to regulate the development of the commercial uses of nuclear power which were then in their infancy. A collegial body was a sound structure to formulate licensing procedures and resolve the many different licensing and policy issues arising from the development of this highly complex new technology.

In the ensuing 34 years much has changed. More than one hundred commercial nuclear power plants have been licensed to operate. As a result, the workload of the NRC has shifted from evaluation of construction permit and operating license applications to the regulation of an operational industry. In carrying out this role, it is the Commission's view that efficient management of this major regulatory task is increasingly important to maximize the effectiveness of NRC's resources.

A commission-type organization does lead to a diversity of technical and professional opinion. Some believe that a single administrator agency would lack the diversity of opinion brought by the commission form. However, a single administrator would have the benefit of a professional staff, capable of providing a broad diversity of technical and professional judgments which might be pertinent to safety decisions. Additionally, our rulemaking and adjudicatory proceedings assure that the single administrator would be amply exposed to a wide range of views on all significant issues.

A majority of the Commission believes that a single administrator should result in increased responsibility and accountability at the top of the agency, which it believes can assist this agency in meeting its statutory mandate to protect the public health and safety. The majority emphasizes that its support for a single administrator is contingent on the restructured agency having the independence to make the necessary public health and safety judgments. Thus, we believe that the agency should have a limited number of Presidential appointees, and a majority believes that it should not be subject to Office of Management and Budget (OMB) regulatory oversight.

Consistent with these views, the majority of the Commission would oppose single administrator legislation if the agency were made part of another federal agency or had more than three Presidential appointees -- the Administrator, the Deputy Administrator and the Inspector General.

It is also imperative that the agency have independence to make necessary health and safety judgments. This can only be assured if, as is now the case, the Office of Management and Budget would not review proposed agency regulatory policy determinations, including draft proposed or final rules. In other words, the restructured organization should continue to carry out its regulatory mission as an independent agency.

Nuclear Safety Board

There are several legislative proposals pending before Congress that would create an independent nuclear safety board to investigate significant events at NRC licensed reactors. In some of those proposals, the board would be a separate federal agency.

The Commission does not object to the establishment of a nuclear safety board if legislation is enacted creating a restructured regulatory agency headed by a single administrator. However, a majority of the Commission advocates that such a board be part of the single administrator agency, rather than established as a separate federal agency.

Establishment of a nuclear safety board as a separate federal agency would result in an unnecessary duplication of functions. For example, the regulatory agency would still require sufficient resources to determine what happened and what actions should be taken after an accident. The regulatory agency could not be expected to rely completely on a nuclear safety board to make its public health and safety determinations for which responsibility had been assigned to the regulatory agency.

Of considerable concern is the fact that an independent nuclear safety board has the very real potential to complicate rather than simplify nuclear regulation by further diffusing accountability and responsibility for the execution of the agency's mission.

We recognize that some will argue that a nuclear safety board needs to be a separate federal agency in order to increase confidence in nuclear incident investigations. This would be achieved by relieving the nuclear regulatory agency of the responsibility to investigate and determine the cause of events to which the regulatory agency's activities might have been contributing factors.

However, a majority of the Commission believes that a nuclear safety board could be given sufficient independence to operate successfully and effectively within the regulatory agency to mitigate these concerns. Such an arrangement would be akin to the functioning of the Commission's licensing and appeal boards which, though a part of the agency, operate independently within their sphere of responsibility.

In sum, the benefits of having the nuclear safety board as part of the regulatory agency outweigh the benefits to be gained by providing it with total independence.

Inspector General

The Commission does not object to a statutory Inspector General (IG) as part of legislation reorganizing the Commission into an agency headed by a single administrator. A majority of the Commission recognizes that a statutory IG could work equally well under the Commission form of governance as under a single administrator.

Statutory Office of Investigations

In 1982, the Commission established an Office of Investigations (OI) that reported directly to the Commission. OI is responsible for investigating potential wrongdoing by licensees, their contractors, vendors, or others in the regulated industry. In late 1987, Congressional conferees directed the Commission to place OI under the supervision of the Office of the Executive Director for Operations. In response to this Conference Committee directive, the Commission took this action effective February 1, 1988. Pending legislative proposals would make OI a statutory office reporting to the head of the agency, rather than to the Executive Director for Operations.

The Commission does not object to legislation which would make OI a statutory office, provided that the legislation does not diminish that office's current accountability to the head of the agency. In this regard, the Commission believes that office should continue to determine how specific investigations should be conducted. OI must be free to draw its own conclusions based on the information developed in its investigations and must be able to continue to report possible criminal violations to the Department of Justice.

On the other hand, the Commission must continue to have the authority to set OI's investigative priorities. In order to carry out its public health and safety responsibilities, the Commission must be able to direct OI to conduct an investigation promptly or to suspend an investigation because of a need to devote resources to higher priority items. Just as the Commission can direct the technical staff where to focus its attention, the Commission needs to be able to direct OI's investigative efforts to matters the Commission believes are most important and relevant to the Commission's regulatory responsibilities.

Since OI has significant input into some NRC licensing and enforcement decisions, it is important that OI have a close working relationship with the head of the agency (whether a Commission or a single administrator). The majority of the Commission believes that it is most desirable for OI to report directly to the head of the agency. On the other hand, the majority also believes that OI can exercise its investigatory functions with competence and integrity in an organizational structure where OI is under the Office of the Executive Director for Operations.

The Commission does not believe nuclear safety is jeopardized by the placement of OI under the EDO. We emphasize that the purpose of the NRC is to ensure the safe use of nuclear energy. Our ability to carry out this mission is not a function of the organizational placement of OI.

Bill Comments

I now turn to the bill reported by the Environment and Public Works Committee. While this bill is a substantial improvement over earlier versions, it still has several provisions which are of concern to us.

The majority of these concerns relate to the Nuclear Reactor Safety Investigations Board which would be part of the restructured agency. The chairman of that board would be nominated by the President and confirmed by the Senate; the other two members would be appointed by the Administrator. Only the President could remove the members. It would seem that, if these three members are to have equal status, they should all be appointed by and removed by the Administrator.

Of greater concern is that under the proposed legislation the Administrator has no supervisory authority over the Investigations Board. The Commission believes that the Investigations Board should have the authority to initiate an investigation (after consultation with the Administrator), determine how an investigation should be conducted, and reach its own independent findings. However, the Investigations Board should be subject to supervision by the Administrator to ensure that its efforts do not unnecessarily duplicate the agency's efforts and that its product is submitted to the Nuclear Safety Agency in a timely fashion.

If the Board is conducting more than one investigation at a time, the Administrator of the Nuclear Safety Agency should be authorized to establish the Board's priorities so that the investigation that is most important from a regulatory perspective is completed first. Because the Board's investigations will provide important information for the Agency's regulatory decisions, it is also essential that the Administrator be able to suggest a schedule for the submission of the Board's report to the Agency. Furthermore, the Administrator should have the authority to request the Board to provide periodic status reports, including preliminary findings.

Finally, the Administrator must be able to supervise interaction between the Investigations Board and the Office of Investigations (OI). We do not believe that the functions of the Investigations Board are intended to include investigations of wrongdoing, but evidence touching on wrongdoing could be uncovered in the course of the Board's activities. In such cases, coordination between OI and the Board may be required.

We would also suggest that employees of the Board (and also those employed by the Inspector General) should be in the excepted service, rather than in the competitive service as provided by the bill. All current NRC employees are in the excepted service, and, therefore, if this legislation is enacted, the restructured agency would be required to have a dual personnel system. This would create an unnecessary administrative burden and could lead to unequal treatment of employees.

Our final concern relates to the proposed elimination of the position of Executive Director for Operations. We believe it would be desirable that the statute provide for the appointment of a senior career civil servant to assist the administrator in the supervision of day-to-day staff activities.

We appreciate the Committee's consideration of the Commission's views on this important piece of legislation. Mr. Chairman, this concludes our testimony. I understand that some of my fellow Commissioners have separate statements.

TESTIMONY OF

COMMISSIONER FREDERICK M. BERNTHAL
U.S. NUCLEAR REGULATORY COMMISSION

before the

SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

April 27, 1988

Mr. Chairman, in a similar hearing before the Senate Committee on Environment and Public Works on October 29, 1987 I provided a rather detailed record statement on this subject. My views have not changed. I will summarize those views briefly, and stress some additional points that have become apparent since then.

I do not believe there are flaws inherent in the commission form of governance, as originally conceived, for regulating a subject as controversial as nuclear power. The need for continuity and stability in the nuclear regulatory process seems to beg for a commission. But the perverse system we now have goes far beyond stability -- it is tying us in knots. It leads not to consensus, but to fragmented and ultimately flawed decisions.

The point of collegiality was to promote balanced and well-reasoned decisions, based on the hope that five heads of diverse experience and knowledge are better than one. But the Sunshine Act, as interpreted in NRC regulation by an earlier Commission, has so undermined the practice of collegial decision-making that I have little doubt that statute will eventually preside over the general demise of the commission form.

And the public interest will be the loser for that. If collegial decision-making is desirable in principle but impossible in practice because of misguided if well-intentioned law and regulation, there should be a better solution than to dispose of collegial decision-making.

Ironically, it is not the more politically responsive single-administrator executive-branch agencies which have been penalized into near-terminal fecklessness; it is we commissions -- we with the checks and balances inherent in diverse and publicy expressed views.

It will be illuminating to see how much sun shines on the private deliberations of a single administrator head of the Nuclear Regulatory Agency.

I have also long believed that Congress' decision to abolish its own Joint Committee on Atomic Energy (JCAE), which used to oversee all aspects of the development and use of this still new technology, was a fateful mistake. A decade ago, Congress began to speak with a multitude of voices in carrying out its oversight of the vital nuclear enterprise.

It remains a serious question whether the present fragmented oversight jurisdiction can provide the thoughtful, coherent direction needed on these matters so essential to our national well-being and security. As you especially know, Mr. Chairman, this problem extends well beyond the narrow confines of the NRC regulatory mission being considered here today.

But realism dictates that we now seek practical solutions, and indeed, our cumbersome administrative procedures are far from the only or even the best arguments for change at the NRC.

In my judgment, the principle of checks and balances must be reintroduced, and accountability must be restored in order to remedy the situation at the NRC.

The remedy must be carefully undertaken, however. For just as a competent, objective, dedicated single administrator could more effectively and productively manage the operations-oriented nuclear regulation of the 1990's, a less capable or less well-motivated individual could in short order do irreparable damage to the still fragile viability of the nuclear option in this nation.

A single administrator of the NRC should therefore serve at the pleasure of the President within the executive branch, as does the Administrator of the Environmental Protection Agency. I will strongly oppose any single administrator proposal that does little more than dispose of the distraction of the four additional opinions now present on the Commission.

That would leave unresolved what I consider to be the principal difficulty of the Commission form of governance -- lack of accountability, and no effective balance between executive and legislative oversight of the NRC.

In that vein, I note the view of the Commission majority that regulations proposed by a single administrator NRC should not be subject to review by the Office of Management and Budget. As a Commissioner, I can hardly be unsympathetic. But while the principle intended is laudatory, in practice I believe it is impossible and unwise so to attempt to constrain Presidential authority.

The new agency either will be an executive branch agency, subject to Presidential authority, with an Administrator serving at the pleasure of the President, or it will not be. I do not believe it is possible to have it both ways. The Environmental Protection Agency, with a similar mission no less vital to public health and safety than that of the NRC, has long carried out its responsibilities within the confines of Executive Branch authority.

As for an Independent Safety Board, I have always supported the establishment of such a Board only in the event that the NRC becomes a single administrator, executive branch agency. The Rogovin and Kemeny Commissions both recommended such a Safety Board within that context.

But then the Board should stand substantially apart from the NRC. And it must have an appropriate threshold, specified in statute, for initiating its investigations. Time and the record continue to show that we should expect not more than one or two events per year that might require such an independent investigation.

Should Congress fail to establish a single administrator NRC, I would continue to oppose the Safety Board concept, because we already have an independent nuclear safety board -- it's an independent agency called the Nuclear Regulatory Commission.

We now have approximately two dozen nuclear powerplants in the first two years of operation in our country. Only a handful of plants remain to be licensed, and those will come before the Commission at lengthening intervals into the mid-1990's. More than I could have anticipated even a year ago, it is manifestly apparent that this evolution is already dramatically changing the mission of the NRC.

We are today an agency preoccupied not with engineering and construction, but with the safe operation of nuclear powerplants and the safe use and disposal of radioactive materials -- a mode likely to continue through the remainder of this century. More and more, the Commission concerns itself not with policy, but with standards, regulatory compliance, enforcement, and management.

Such responsibilities are clearly better suited to a single agency head responsible to the President than to a collegial governing body. The similarities of such responsibilities to those of a sister Federal agency should not be overlooked.

Relieved of its special responsibility to oversee a historically great multitude of engineering and construction projects, the NRC more than ever shares with the EPA the common objective to protect public health and safety, and the environment.

Indeed, I believe Congress will one day come to consider the advantages of combining the NRC and the Environmental Protection Agency under a single agency head. The idea is hardly novel; several European countries have a similar arrangement.

The risks associated with acid rain, chemical wastes, chloroflurocarbons, global climate change, and the panoply of environmental insults generated by the activities of man may then, along with the risks of nuclear power generation, finally be treated on a common footing.

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SUBMITTED BY

COMMISSIONER KENNETH C. ROGERS

UNITED STATES NUCLEAR REGULATORY COMMISSION

Mr. Chairman, Members of the Subcommittee, I am pleased to offer my comments on the proposed disestablishment of the Nuclear Regulatory Commission and its replacement by a new Nuclear Safety Agency.

We have been focusing primarily on two alternatives: an agency directed in both policy and operations by a Commission of equal status members, or an agency headed by a single individual vested with both policy and operational authority in all matters. A third alternative, which is the full implementation and strengthening of the Presidentially prepared NRC Reorganization Plan No. 1 of 1980, in my opinion, is superior to either of these organizational models. In that Plan, the Chairman of the Commission is the principal executive officer of the Agency and is responsible for the management of all operational matters. The other Commissioners are limited to policy setting, rulemaking, and adjudications. By formally adopting Plan No. 1 and by enacting legislation to designate the Chairman of the Commission as the Chief Executive Officer of the Agency, both the policy making advantages of a Commission and the management efficiencies of a Single Administrator organization can be achieved. Such a change would strengthen the present Agency and would avoid the disruptive consequences of a total reorganization of the Agency top management.

I have functioned both as a chief executive officer and as a policy setter in various organizations of the type that could result from the simple change I advocate. A board of directors or a board of trustees sets policy and a chief executive officer runs the organization which carries out those policies. Those who set policy in such an organization must understand the difference between day by day operational matters and policy setting. Experienced corporate managers have learned this distinction and intuitively know how to avoid intruding into operational matters when they serve as policy setters on boards. Of course, operational line management responsibility and accountability must be vested in a single individual. A policy and adjudicatory board cannot provide the day-to-day supervision that is necessary, nor can it make the daily operational decisions that must be made for an organization to run smoothly and efficiently. A suitably constituted commission can discipline itself to act at the fastest pace the law allows while avoiding those activities which are not their proper domain.

I have seen no convincing evidence in recent Federal government history that any one type of organizational structure is, in itself, notably more effective than any other. Rather, it is the quality, capability and dedication of the individuals who run organizations that determine the results. Both single administrator agencies and commissions have had their successes and failures. What a single administrator agency may gain in single point accountability and perhaps some marginal increase in efficiency, can be lost in decreased public openness in decision making, breaks in continuity over changing administrations, and less likelihood of inclusion of the full range of policy options.

I would like to elaborate briefly on two principal disadvantages of a single administrator agency, a lack of diversity of point of view and a lack of public visibility of decision making.

First, a single administrator agency should be headed by a strong personality. The subordinates of such individuals tend to be people who are selected for their capacity to carry out decisions effectively but not necessarily to set policy, and they are unlikely to advance any counter views on policy matters to those held by their superior. A diversity of viewpoints on policy matters is most likely to come from a group of individuals who are not subordinate to the administrator and who have had the kind of broad experience that should be required of those who set policy. Such individuals should be peers, not subordinates, of the administrator and should have had career records of accomplishment that command the respect of each other and of the administrator.

Second, a move from a Commission to a single administrator agency can result in a decrease in visible public accountability. Commissioners' decision making must be carried out in open public meetings with high visibility. Each Commissioner can be required by Congress to account for his or her decisions, which are all on the public record. By contrast decisions made by a single administrator together with his or her subordinates are less immediately visible and are not made before the eyes of the public. While a single administrator can also be called to account by Congress, day by day policy and operational decisions are not made in public view and are much less immediately visible. Therefore a move from Commission to single administrator organization can result in less rather than greater accountability.

We all, I believe, recognize the very complex nature of nuclear technology. We also recognize the fallibility of any one individual -- whether he or she be a licensed operator of a nuclear power station, a licensed therapist administering a radiopharmaceutical to a patient, or the single administrator of a Federal agency whose mandate is protection of public health and safety. A collegial body of highly qualified individuals is a time-honored means to establish sound bases for formulating effective and efficient policies when strong historical experience is lacking. In a number of areas the Commission will be facing new far-reaching policy issues in the next few years. These are likely to include licensing decisions on waste disposal and related issues and the regulatory consequences of the development of a future generation of nuclear power plants. For these tasks the multiple viewpoints of a Commission, with explicit visibility to the public of their decision making, have important advantages.

My most serious concerns regarding a change from Commission to single administrator governance of the NRC at this time is that such a change may divert attention from the legislative action needed to improve and streamline nuclear regulatory processes, disrupt regulatory staff's ability to function at its peak, provide an opportunity for those licensees so inclined to go slowly on actions which improve safety but are not yet required, and create a serious leadership vacuum during a prolonged transition period. I am not opposed to a single administrator organization, but I am also not persuaded that the expected improvements that have provided the motivation for a governance change will occur by enactment of S . I believe the simpler approach that I have described would be better.

On the matters of a Nuclear Safety Board, an Inspector General, and a Statutory Office of Investigations, I support these as part of the Agency and see no reason why they should not be included directly in either the present Commission structure or in the modified Commission organization with the Chairman designated as CEO that I believe would be best.

I agree with all of Chairman Zech's comments and concerns on these three subjects as they are defined in S . I also support his statements regarding the independence of the Federal agency regulating nuclear energy. It should not be made part of another Federal agency. As is now the case, its regulatory decisions including proposed and final rules should not be subject to review by the Office of Management and Budget.

PREPARED STATEMENT OF JOSEPH R. WRIGHT

Mr. Chairman, members of the Subcommittee, I am pleased to appear before you this morning to discuss Title I of the Nuclear Regulation Reorganization and Reform Act of 1988, as ordered reported by the Senate Committee on Environment and Public Works. This proposed legislation would replace the Nuclear Regulatory Commission with a new agency, the Nuclear Safety Agency, headed by a single administrator. The bill would establish an independent Nuclear Reactor Safety Investigations Board within the restructured agency, establish a statutory Inspector General, and provide for a statutory Office of Investigations that would report to the single administrator.

Before I address specific aspects of this bill, I want to say at the outset that I am going to confine my remarks to organizational and management issues. I will leave the more technical nuclear questions to those with the expertise in this field.

Mr. Chairman, you asked that I address three issues today. They are:

1. The advantages and drawbacks of the proposed change from an independent regulatory agency run by a commission to an agency headed by a single administrator.

2. The feasibility of the proposed relationship of the Nuclear Safety Agency to the remainder of the Executive Branch, including the White House and Office of Management and Budget.

3. The proposed placement, membership, jurisdiction, cost and operation of the Nuclear Reactor Safety Board.

Single Administrator versus Commission

Again, I will leave it to others to talk about the benefits of how a single administrator would affect the regulation of commercial nuclear power. Rather, I want to address the advantages and drawbacks of changing the way the Government does its business; in this case, the running of a regulatory agency.

You have already heard in the testimony of the Chairman of the NRC that, in the judgment of distinguished outside groups - from the Rogovin Special Inquiry Group to the Kemeny Commission - there needs to be a single chief executive at the head of the NRC. We join the majority of NRC Commissioners in endorsing that judgment. It simply makes good sense to have an agency speaking with one voice. Today we have doubt and confusion engendered by 3-2 or 4-1 votes, and we have management by committee, which almost negates the possibility of management at all. Again, you have heard this story from the Commissioners themselves at your hearing of April 27th.

With the amount of material you have been presented thus far, I don't think that there are any doubts that the agency would be run more efficiently if there were one person in charge rather than five.

Thus, to answer your first question, if the agency were structured properly, from a management point of view there would be distinct advantages in having a single administrator.

Feasibility of Proposed Relationship

Which brings me to your second question, about the feasibility of the proposed relationship of the agency to the rest of the Executive Branch. Here we see potential problems.

Senator Breaux, in his testimony to you on April 27th, stated that in drafting the bill he was specifically concerned that lack of accountability is one of the biggest problems facing nuclear regulation; he saw the need to have a Presidentially-appointed Administrator so that the Administrator would be directly accountable to the President. It is my opinion, however, that this bill does not really provide for the accountability to the President that seems to have been the starting point for efforts to reorganize the NRC.

Although the bill creates an Administrator who serves at the pleasure of the President, the agency is created as an "Independent Establishment," with legislative and budgetary bypass authority. The new agency would be statutorily exempt from the coordination and clearance process that is used uniformly in the Executive Branch. Even the current NRC is not exempt from that process.

Thus, the bill creates a situation where the President can name an appointee and remove an appointee but, short of that, the President might have little or no ability to work with the Administrator. How would the President even be able to evaluate his performance. For the Administrator's part, he could have great difficulty in coordinating with other parts of the Government on any issue before going public.

So there are two problems. The first problem is the relationship between the Administrator and the President. Does he serve the President, Congress, in which order? How is he held accountable to the President? Again, I refer to Senator Breaux's stated motivation in crafting the role of the single administrator. The second problem is the relationship between the Agency and the President. What does it mean in terms of accountability to be an "Independent Establishment"? The relationship to Congress and the President is well-defined for independent commissions and regular Executive Branch agencies. But this bill provides for a hybrid that, to my knowledge, is without precedent.

Let me state the two problems somewhat differently. First, there is a need for an agency that is well run and a consensus that a single administrator should run the agency. But, there is also a desire to maintain the relationship Congress now has with the NRC. This has led to provisions in the bill that avoid control by the Executive Branch. But this goes against the intention of the Environment Committee, as Senator Breaux stated in his testimony, that the new agency be more directly accountable to the President.

Let me offer a possible solution. I would assert that it is indeed acceptable to establish the new agency in the Executive Branch and that Congress can have the appropriate oversight.

Congress has many ways in which it can influence the actions of Executive Branch agencies - through oversight hearings, through the budget, through the threat of legislation to fix problems that arise from time to time. These methods work and they are part of our established system of checks and balances. The fact is that Congress will not lose control if the new agency becomes part of the Executive Branch.

Above all, I would specifically urge you to refrain from setting up an agency that is a hybrid, with an administrator whose lines of responsibility are uncertain. Such a move can only lead to problems -- and the members of this committee will assuredly then be called on again if a new set of problems becomes evident.

Now for the Reactor Safety Board.

Nuclear Safety Reactor Board

The Environment and Public Works bill proposes the creation of an independent Nuclear Reactor Safety Board to investigate significant events at NRC-licensed reactors. The Board would be called upon to submit its findings and recommendations to the Administrator and the Administrator would be required to respond to these recommendations within 120 days. Findings of the board would be made public and submitted to Congress concurrently with being sent to the Administrator.

I believe that the letter from the Department of Justice to the Environment Committee speaks for itself on the constitutionality of the Board as structured in the present bill.

I want to confine my remarks to the items you asked about in your letter: specifically, placement, membership, jurisdiction, cost and operation.

Placement

We note the Committee's concern as expressed in the bill that a potential conflict of interest exists in the investigation of safety events where the agency's action or inaction may have contributed to causing the event. This would argue for a board completely outside the agency. At the same time, we agree with the concern voiced by Chairman Zech that an independent safety board has a potential to complicate rather than simplify nuclear regulation by further diffusing accountability and responsibility for the execution of the agency's mission.

We support the position of the majority of the NRC Commissioners in favor of creating a safety board, but creating it within a restructured regulatory agency headed by a single Administrator. I say this purely from a management point of view. We can foresee that the Board would have very little to do while ther are no incidents, then have an enormous amount of work to do during an investigtion. It is difficult to balance resources for such a group and it helps if they are part of a larger agency that can provide the services the Board would need - budget, space, clerical help.

Membership

The contentious issue here is the appointments process. The Department of Justice position on this has been covered in a letter to the Environment Committee.

As to the qualifications of the members of the Board, we concur that membership should be based on "technical qualification, professional standing and demonstrated competence and knowledge...." The drafters of the Bill are absolutely correct in trying to keep politics away from investigations of nuclear incidents.

Jurisdiction

The question here is, "what or who should determine what the Board investigates?" We agree with Commissioner Bernthal that it is essential to define in legislation the types of incidents that would trigger an investigation. But we also believe it is important for the agency to have supervisory authority while it respects the Board's independence. The Administrator should be responsible for making sure that investigations of the Safety Board are responsive to regulatory needs and should be consulted as the Board prioritizes its activities.

Cost and Operation

From a purely budgetary standpoint, if the Board is to operate within the agency, its budget should be submitted as a line item within the budget of the agency. It should therefore be the responsibility of the Administator to ensure that the Board is operating within any fiscal constraints that may exist.

Conclusion

I would like to close by stating that the regulation of nuclear power is a difficult job. The technology is complex and the consequences of an accident are enormous. The regulation of nuclear power requires those involved to be not only highly trained but deeply dedicated to protecting the health and safety of the public.

The issue we are dealing with today is restructuring the NRC. While we focus on steps to help improve the process of regulation, we are concerned first with the substantive issues and want to make sure that the legislation reasserts our full support for the people we depend on to license and oversee the operation of the nuclear power plants in this country.

I appreciate the Committee's consideration of OMB's views on this important piece of legislation. Mr. Chairman, this concludes my testimony.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JUN 2 1988

Honorable John Glenn
United States Senate
Washington, D.C. 20510

Dear Senator Glenn:

At the hearing on May 12th, I promised that I would supply further information on three points. They were:

1. The question of "independence" of the Nuclear Regulatory Commission as it relates to OMB review of testimony and budgets and legislative proposals.

2. Whether the number of SES's might be capped at some level in a reorganized agency.

3. Whether it might be appropriate for the regulation of nuclear power to be managed within the EPA, instead of by an entirely separate agency.

The response to each of those issues is attached.

If you desire any further information on this or other issues relevant to the proposed NRC reorganization bill, please feel free to contact me.

Sincerely yours,

Joseph R. Wright
Deputy Director

Attachment

Attachment

Answers to Questions from Hearing of May 12, 1988

OMB Clearance and Coordination

Because the Nuclear Regulatory Commission has no specific exemption in its statute, it is subject to the normal OMB clearance and coordination process for legislation and budget.

That process is set forth in OMB Circular A-19, which describes procedures for OMB coordination and clearance of Executive branch agency recommendations on proposed, pending, and enrolled legislation, and states that all Executive branch agencies, including any executive department or independent commission, are subject to the provisions of the circular. The exceptions are those agencies that are specifically required by law to transmit their legislative proposals, reports, or testimony to Congress without prior clearance, which requirements the Justice Department advises is unconstitutional if it applies to other than a truly independent agency.

The Office of Management and Budget's coordination, on behalf of the President, of legislative proposals and positions by the various agencies serves several important purposes for the Administration, individual agencies, and Congress: (a) it encourages the various agencies to take the problems and concerns of other agencies into account; (b) it gives agencies, such as the NRC, the opportunity to comment on other agencies' proposals or positions of concern to them; (c) it facilitates the development of a consistent Administration position on legislation; and (d) it assures that Congress gets coordinated and informative agency views on legislation under consideration.

Limits on Number of SES Allocations

In FY 1987, the NRC had 220 SES allocations, 193 of which were filled. This is 1 SES position for every 15 employees. The Government average is 1 for every 134. NRC has the highest ratio of any Government agency. The next closest ratio to NRC's is 1 to 46. OMB does not set the limits for SES positions; this is an OPM responsibility. After consultat[illegible] with OMB, OPM set the NRC limit for FY 1988 at 211 SES positions. OPM believes it is not appropriate to limit the number of SES employees via statute. OPM prefers to set the limits after consultation with OMB and Congress.

Regulation of Nuclear Power within EPA

As Commissioner Bernthal pointed out in his testimony before the Committee on April 27th, the NRC today is more concerned with standards, regulatory compliance enforcement and management than with setting policy on construction and engineering.

As the role of NRC shifts towards regulatory compliance, the roles of EPA and NRC become more similar. As an example, NRC is responsible for setting standards for emissions of radioactivity within the boundaries of a nuclear power plant. EPA has responsibility for setting standards on offsite emissions.

Certainly, from a management point of view, many of the concerns I raised before your Committee might conceivably be resolved if the NRC were an office operating within EPA. However, there are factors involved in NRC-EPA consolidation that would need to be considered. For example, a consolidation would add considerably to the already broad range of issues currently facing the EPA Administrator, and may not result in the appropriate degree of attention to nuclear regulatory issues.

I must add, however, that these are only preliminary thoughts on this subject. There are administrative, technical and policy issues which would need to be explored more thoroughly before a definitive statement could be rendered on whether such a change is desirable.

PREPARED STATEMENT OF BEN B. HAYES

Good morning, Senator Glenn. My name is Ben Hayes. I have been the Director of the NRC Office of Investigations (OI) since February 1983. Since I appeared before you last April, OI has been transferred under the Office of the Executive Director for Operations. I now report not directly to the Commission, but to the Deputy Executive Director for Operations. In my view, the Office of Investigations has even less independence and authority than it did a year ago.

In my testimony today, I will discuss why I believe this to be the case. I will also mention some additional authorities and/or organizational changes which could enhance OI effectiveness. First, however, I will provide my views concerning the impact on the operations and functions of the Office of Investigations of the Nuclear Safety Agency legislation proposed by Senators Breaux and Simpson.

COMMENTS ON LEGISLATIVE PROPOSALS

Subtitle C of the Breaux-Simpson bill would establish an Office of Investigations to be headed by an Assistant Administrator for Investigations. This is an appropriate reporting level for OI in the new agency. Moreover, the investigative jurisdiction described for OI, the authorities given its Director, and the requirement for Agency employees to report wrongdoing to OI would improve the authority and independence of the investigative function considerably.

On the other hand, I disagree with the provision which would allow the Administrator to prevent the initiation of a investigation if "public health and safety requires otherwise." I cannot recall a single investigative matter in over five years as Director, OI, where the investigation could have impacted adversely on the public health and safety. At the same time, the term "safety" is all too frequently evoked at the NRC -- without a clear definition of what it really means. For example, it is often used in opposition to "wrongdoing" as if wrongdoing, as defined by the NRC, did not always involve safety. Without a clear understanding of what safety is (for instance, does it include character and integrity matters?), legitimate investigations could be stifled for unsound reasons.

There also is a possible overlap of functions between OI and the Nuclear Reactor Safety Investigations Board. It is not clear whether a Board investigation could take precedence over an OI investigation. If so, it could cause a delay that could affect chances of criminal or civil prosecution of any willful violations that may have caused the accident. Moreover, the proposed prohibition of the use of Board findings in law suits raises the possibility that Board evidence may not be able to be used in civil or criminal prosecutions. This issue needs to be clarified.

My last comment regarding the bill is the inclusion of the requirement for a memorandum of understanding with the Department of Justice within 90 days. I do not believe an arbitrary time limit on interagency negotiations is the best way to ensure that a workable and effective agreement is reached.

In sum, I believe that the language of this bill would improve the independence and authority of the investigative function considerably over its current situation. That is not to say that there are not additional investigative authorities that could be added to the legislation which would further enhance the investigative function.

ADDITIONAL INVESTIGATIVE AUTHORITIES

The Office of Investigations needs express, criminal investigative authority to investigate violations of statutes or regulations otherwise within the civil jurisdiction of the NRC. This authority not only would provide OI with some important investigative tools, it would remove some of the ambiguity that attends our current investigations. Virtually every case of wrongdoing that OI investigates involves potentially criminal as well as civil violations. The Department of Justice has recommended that this criminal investigative authority be given OI on at least two occasions, most recently in the Department's March 21, 1988, comments on the Breaux-Simpson bill.

The Director, OI, also needs the authority to appoint, supervise, and direct all subordinate employees. Although statutory inspectors general have such authority, the Director, OI, does not. Such authority would help assure the independence of OI by providing protection against the arbitrary reassignment of personnel to and from OI. Clearly, neither OI nor any other investigative organization can be considered truly independent if persons other than the Director control personnel actions regarding that unit.

In sum, the addition of these authorities plus those already found in the bill, would allow this office to carry out its functions with competence and integrity. It is especially important that these authorities are to be conferred legislatively. Absent legislation, they would be subject to reconsideration every time the composition of the Commission changes. The investigative function must be insulated from the political process, be it internal or external. I believe the importance of the NRC investigative program to the protection of the public health and safety warrants nothing less than this.

IMPACT OF TRANSFER OF OI UNDER STAFF

I noted earlier that the transfer of OI under the Office of the Deputy Executive Director for Operations (EDO) has resulted in less independence and authority for OI. Let me expand a bit on this.

Like any investigative organization, the Office of Investigations must have both the appearance and the reality of sufficient organizational independence in order to be able to conduct thorough and objective investigations. The only effective way to achieve this in the NRC is to have the Director of the Office of Investigations report directly to the Commission -- as was the case for the first five and a half years of OI's existence.

A document entitled "Quality Standards for Investigations" issued by the President's Council on Integrity and Efficiency is especially relevant to this issue. It discusses, among other things, the need for investigative organizations to be, "... free, both in fact and appearance, from impairments to independence... ". It also notes:

> "The investigative organization should report to the head or deputy head of the government authority to refer investigations to the appropriate prosecutive authorities and top management without fear of censure."

Having OI report to the EDO or Deputy EDO, neither of whom is the head nor deputy agency head, erodes both the "fact and appearance" of independence. Moreover, it creates some inherent conflicts.

The authorities and responsibilities previously given OI are supposed to remain unaffected by our placement under Staff. That is fine in theory, but not so fine in practice. These authorities were given the Director, OI, when he worked directly for the Commission. Thus, to say that the Director, OI, has the authority to initiate investigations on his own authority, but that the EDO must submit a written request, made sense at the time. Now the EDO is my second level supervisor. Am I really free to exercise this authority over his objections? Do I "stick to my guns" every time we have a disagreement, or do I begin to compromise in smaller, seemingly less important matters? Let us look at another potential conflict.

In the past, OI investigations have occasionally identified NRC program deficiencies or Staff actions as contributing to licensee violations investigated by OI. As a Commission-level office, we were free to pursue all logical investigative leads regardless of whether they might antagonize senior NRC managers. Now we are part of the staff, it is obviously prudent to pause and weigh the gains versus losses of pursuing these kinds of issues.

The consequence of structuring an investigative office in this manner is that it places me or any future OI Director in a situation where there is considerable pressure not to seem unreasonable, to appear to be a "team player". It would take a very strong person indeed to put aside "fear of censure" and continue to make investigative decisions consistently without regard to those considerations.

Another consequence of OI being moved under the Staff could be the loss of OI's candid advice or opinions regarding various regulatory initiatives impacting on the investigative program. Over the years, OI has provided the Commission its views on such issues as Material False Statements, Fitness for Duty (drug use), and the proposal to reopen closed enforcement cases only when a licensee would benefit. As a Staff Office, OI no longer has the same freedom or opportunity to provide our views regarding Staff initiatives about which we disagree. For instance, our views have not been solicited on the proposed Fitness for Duty Rule notwithstanding our extensive comments on this subject in the past.

Over the past five years, OI has established an excellent reputation among critics of past NRC investigations. For example, we now have an excellent working relationship with the Department of Justice, and have been able to work effectively with public interest groups or intervenors. The fact that OI as a Commission office was not a party to licensing proceedings facilitated this cooperation. (Conversely, as a Staff office, OI is now a party to such proceedings).

One of the benefits to the NRC of the appearance of OI's independence and integrity had been the increased willingness for allegers to bring information to us. Thus, important public safety concerns that might otherwise have gone unreported, or have been reported only through third party groups, were reported directly to the NRC. One of the factors that made our efforts credible to allegers was OI's status as a Commission-level office. It is an unpleasant reality that many persons outside the NRC have a distinct distrust of the NRC Staff. Whether this distrust is warranted is not the issue. The point is this perception can have some very real effects such as a reluctance to bring allegations to the NRC in a timely manner. Although it may be too early to tell, it appears that there has been a downturn in allegations to OI from both individuals and groups since our placement under Staff.

This matter of perception also has impact within the NRC. OI's former status as a Commission office was a clear statement to the Staff of the Commission's interest in and support of the NRC investigative program. This consequently assured the cooperation of all Staff personnel, even those whose appreciation or support of the investigative program was less than enthusiastic. Moving OI further down within the NRC organizational structure communicated just the opposite message.

I have only highlighted some of the ramifications of our placement under the Staff. I will continue by discussing the effects on the morale of OI and the need for prompt action to remedy our current situation.

NEED FOR PROMPT ACTION

I am afraid we do not have a lot of time. The sudden, unexpected February 1, 1988, placement of OI under the Office of the Executive Director for Operations was a devastating blow to OI morale. A high workload coupled with a chronic shortfall of resources, not to mention the continuing anxiety regarding whether OI would be placed under the EDO, has also taken its toll.

The practical effect of this low morale is this: My entire headquarters investigative staff has indicated their intention to seek employment elsewhere. Three out of the five OI field office directors have said the same thing. The same situation exists at the working investigator level.

In one field office, three out of four investigators have interviewed with another Federal agency. Recently, a senior investigator in yet another field office told me he was seriously considering accepting a position with another agency that would result in a downgrade from a GS-14 to a GS-12, a loss of about $6000 per year.

Senator Glenn, we simply cannot afford to lose investigators of this caliber, and certainly not because they are worried about whether they will be allowed to perform as professional federal investigators. That is what is so compelling to me -- it is not a matter of money or personal advantage. They just want to be able to do their job.

What I am saying, Senator, is that if we do not act swiftly, there will be no OI, just an empty shell. I, of course, will do what I can to shore up OI morale -- it is my management responsibility -- but most of these stressors are beyond my control. OI investigators need a clear signal that they are, in fact, valued, and that the United States Congress will take the steps necessary to ensure they are free of impairments to investigative independence in both "fact and appearance." We desperately need legislation as soon as possible.

POSSIBLE NON-LEGISLATIVE ALTERNATIVES

As much as I respect and favor the legislative process as being the optimum mechanism for restoring OI independence, I fear that even under the best of circumstances, it may prove too slow to alleviate our current situation. There are, however, some alternatives the Commission could implement while we await the legislative process.

The quickest fix would be for the Commission to restore OI to its former status as a Commission-level office with the understanding that the authorities and responsibilities OI had prior to February 1, 1988 remain in effect. Although that may be the most expedient measure, there is another option the Commission could exercise -- combine OI and OIA as a non-statutory Office of Inspector General.

One benefit of this action is that it would allow elevation of the NRC investigative function to the Commission level without directly confronting the restrictive language of House Joint Resolution 395. It also would offer certain economies of scale by reducing the present duplicative administrative/managerial support staffs of the two investigative offices. This would be especially responsive to some of the concerns expressed about efficiency and economy in the Joint Resolution.

Another benefit is it would reduce the confusion about overlapping investigative jurisdiction I described in my letter of last year. Additionally, it would give the so-called internal investigative function a field structure; this would allow a faster response to internal investigative concerns.

In testimony before you on April 27, the General Accounting Office, commenting on the Breaux-Simpson bill, noted that it was difficult to justify the need for two investigative offices in that the, "... functions of the Assistant Administrator for Investigations as proposed by the bill would appear to duplicate the work of the Inspector General and agency staff...". The thrust of the GAO testimony is that the Inspector General could do the types of investigations proposed for OI. Clearly the same argument would apply to the current NRC configuration. GAO is not alone in supporting the concept of a combined investigations office.

I understand the record from the April 26, 1988 Committee on Interior and Insular Affairs hearing on the NRC contains a letter from Mr. Charles Dempsey, former Inspector General at both HUD and EPA. Mr. Dempsey reportedly urges OI be made part of an Office of Inspector General reporting to the Commission.

In sum, the GAO testimony, the Dempsey recommendation, and the rationale that I set forth in my letter of last year (which I will again enclose for the record) establish a sound basis for combining the offices. I urge it be done as soon as possible as a stopgap measure.

CONCLUSION

In summary, if time were not a factor, my clear first choice would be a statutory Office of Inspector General consisting of both OI and OIA. My second choice would be the Breaux-Simpson bill or H.R. 4140, the bill introduced in the House by Representatives Sharp and Gejdenson. I prefer the latter for pragmatic reasons; i.e., the chances of it reaching fruition faster because it decouples the OI "fix" from more politically charged issues such as the single administrator. But as I noted above, time is a factor.

Senator Glenn, I fear the erosion of the "fact and appearance" of OI independence will continue unless something is done quickly, as will the loss of highly valuable OI employees. Our frustration increases daily. We have yet to hear testimony from anyone suggesting the investigative function has been improved by placing it under Staff. To the contrary, the testimony at your April 27 hearing as well as that of the April 26 Udall hearing clearly supported the need for OI to be a Commission-level office. Indeed, it appears that nine out of ten present or former NRC Commissioners favor having OI report directly to the Commission. Yet here we are -- still under Staff. Candidly, I don't really understand why.

Senator Glenn, we certainly appreciate your past efforts to help us. We are most grateful to you. We would most certainly appreciate anything you could do for us now.

Sir, that ends my prepared remarks. I would be pleased to respond to any questions you might have.

STATEMENT BY JAMES K. ASSELSTINE

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

MAY 12, 1988

Mr. Chairman, I appreciate the opportunity to offer a few comments on the various legislative proposals now being considered by the Congress to reorganize the Nuclear Regulatory Commission. I intend to focus my remarks on the proposals to protect the independence of the NRC's Office of Investigations, to create an independent Nuclear Safety Board, and to replace the NRC with a Nuclear Safety Agency headed by a single administrator. Briefly, I support efforts to protect the independence of the NRC's Office of Investigations. In addition, I support the creation of an independent Nuclear Safety Board to evaluate and advise the NRC and the Congress on significant nuclear operating events. And, I continue to support the retention of the Commission organization structure for the NRC as opposed to a single administrator. In each of these areas, I have some concerns about provisions in the version of the "Nuclear Regulation Reorganization and Reform Act of 1988" which was ordered reported by the Senate Environment and Public Works Committee.

NRC Office of Investigations

On the subject of the NRC's Office of Investigations, I support efforts to protect the independence of OI. The credibility of the NRC's Office of Investigations is an essential component of the Agency's credibility as an effective regulator. The NRC does not have the resources to do more than audit its licensees' programs. The NRC must be sure, therefore, that licensees are not purposely circumventing its regulations or failing to report significant information necessary for the NRC to make informed decisions. By investigating and providing the information necessary to support enforcement action when a licensee willfully violates NRC regulations, OI's efforts help to ensure the integrity of licensees' programs so that the Agency can rely on the licensees to carry out their responsibilities. Further, there is a direct connection between the respect of the public for the NRC's investigatory efforts and their belief in the integrity of the Agency's regulatory process. A strong, competent, and independent OI helps to ensure that people believe the Agency is truly interested in uncovering wrongdoing and in enforcing its regulations. This in turn leads to enhanced trust in the NRC to protect the public health and safety. Efforts to make the office more independent and to protect the integrity of OI's investigations can only help to ensure that OI can continue to perform this vital function.

Before the Office of Investigations was created, the NRC's investigations of wrongdoing issues lacked credibility, both with the public and with the Department of Justice. Investigations often were performed by inspectors who were not trained investigators, who did not know what questions to ask, and who did not know about techniques for gathering and protecting documents. As a result, investigative reports were not competent or complete. In addition, there was a perception on the part of some that the NRC staff was not objective about wrongdoing issues because investigations got in the way of licensing plants. Given this less than competent performance and a perception of sponsorship of license applications by the NRC staff, both the Department of Justice and the public concluded that the NRC was not serious about uncovering wrongdoing.

In order to obtain credibility, the Commission decided to establish an Office of Investigations which would be independent of the NRC staff, which would report to the Commission directly, and which would be composed of trained, professional investigators. Because of the NRC staff's poor past performance, the Commission felt that a Commission level office was essential to establishing trust in the investigative function. OI has been effective in doing just that. NRC's relations with the Department of Justice improved immensely largely because OI investigations were performed in a competent and professional manner. In fact, the NRC has received several letters from the Department of Justice commenting on the high quality of OI's work. And, public trust in the investigative function has been enhanced by OI's performance, and by the fact that OI has been independent of the NRC staff.

I would have to say that the recent decision by the Commission at the urging of the House Appropriations Committee to have OI report to the NRC staff is a step backward, and legislation is probably needed at this point to restore OI's independence and preserve its effectiveness. One proposal to accomplish this result is H.R.4140. Another example is subsection 131(a) of the bill ordered reported by the Environment and Public Works Committee, which could be adapted to fit the Commission form of organization as well as a single administrator.

I have one concern, however, with the Environment Committee provision. That provision would prevent the head of the Office of Investigations from initiating an investigation on his or her own initiative if the Administrator determines that the public health and safety requires otherwise. In my view, this qualification on the authority of the Office of Investigations to initiate investigations is unnecessary and unwise. I am unaware of any instance in which the public health and safety has been adversely affected by the initiation of an OI investigation. In fact, quite the contrary has been true for most, if not all, OI investigations. To include such a qualification reinforces and lends credibility to a misperception that is held by some within the NRC that wrongdoing investigations are unrelated to safety and may actually interfere with the Agency's safety mission. I would therefore eliminate this qualification with the explanation that investigations of wrongdoing by OI are an integral part of the NRC's health and safety responsibilities. Finally, I would also support action to preserve the current job classification of OI employees. Without this protection, I fear that OI will soon lose the highly qualified investigators who have been responsible for the success of that office.

Nuclear Safety Board

On the subject of the Nuclear Safety Board, I believe that an independent safety board is needed to assure that the NRC and the industry learn the crucial lessons of operating experience at the plants. Although improvements have been made in recent years in the NRC's ability to investigate serious operating events, the Agency's capability to seek out and correct the root causes of these events is still not what it should be. It is simply not realistic to expect that the NRC will be able to evaluate in a critical and objective manner its own past performance. A Nuclear Safety Board would provide the necessary independence and objectivity. To avoid the proliferation of advisory groups, I would abolish the NRC's Advisory Committee on Reactor Safeguards. In view of the decline in the Commission's licensing caseload and the increasing importance of operating experience at the plants, I believe the Commission, the Congress and the public would be better served by adding a Nuclear Safety Board and by eliminating the ACRS. Good models for a Nuclear Safety Board can be found in S.14 and H.R.3285, and I support them.

There are also provisions for a Nuclear Safety Board in the Environment Committee bill. However, I have several concerns regarding these provisions. First, unlike S.14 and H.R.3285, under the Environment Committee bill only one of the three members of the Safety Board would be appointed by the President and confirmed by the Senate. The remaining two members would be appointed by the single administrator, although they could only be removed by the President. This arrangement in the Environment Committee bill has several drawbacks. The fact that the single administrator will appoint a majority of the Safety Board for relatively short terms of three years and the fact that these Board members can be appointed from the regulatory staff whose performance the Board is intended to evaluate jeopardizes the independence of the Safety Board. Moreover, I understand that the Department of Justice has raised constitutional concerns regarding the appointment and removal provisions for the Safety Board members in the Environment Committee bill. Whether or not the concerns of the Department of Justice are valid, it seems to me the fact that the Department has serious reservations about the constitutionality of these provisions is significant. At a minimum, the existence of such concerns is likely to impair the effectiveness of the Safety Board for a period of years while the issue is resolved by the courts. Both to ensure its independence and to ensure that the Safety Board will be able to carry out its important functions, I would suggest that all of the Board members be appointed by the President and confirmed by the Senate.

Second, the Safety Board provisions in the Environment Committee bill establish a very high threshhold for the types of nuclear operating events that the Safety Board can investigate. Under this threshhold, the Board may only investigate on its own initiative "significant safety events", which are defined as moderate exposure to, or release of, radioactive material, a major degradation of essential safety-related equipment, or a major deficiency in the design, construction, use of, or management controls at a nuclear facility. In addition, before initiating the investigation, the Board must provide a written justification for its determination that the event meets this threshhold. Taken together, these provisions are likely to provide some chilling effect on the Board's ability to investigate operating events at nuclear facilities that are of safety significance. At a minimum, they are likely to lead to some disputes between the Board and those it proposes to investigate over whether the various tests have been met. Rather than attempting to define in advance all of the types of events that might qualify for investigation, I would suggest setting a broad standard in the legislation, such as "significant safety events", and leaving it to the judgment of a Board appointed by the President and confirmed by the Senate to determine whether the broad standard has been met on a case-by-case basis.

Commission Structure vs. Single Administrator

On the subject of converting the present NRC Commission organizational structure to a single administrator form of organization, I would say that both the Environment Committee bill and H.R.3285 present generally workable approaches. However, if the Congress chooses to restructure the NRC as a single administrator agency, I believe that this change should be accompanied by a strong and independent Nuclear Safety Board, statutory protections for the Office of Investigations, and an independent statutory Inspector General along the lines of the provision already approved by the Senate. A package such as that contained in H.R.3285 would accomplish this result.

I would note at the outset, Mr. Chairman, that there appear to be somewhat conflicting goals and objectives for the various reorganization proposals being considered for the NRC. For example, changes such as an independent statutory Inspector General, statutory protection for the Office of Investigations, and an independent Nuclear Safety Board seem to have as their objective providing greater accountability and an improved system of checks and balances to address perceived problems in the Commission's current operations. In contrast, the single administrator reorganization has as its objective greater streamlining and efficiency, and more centralization of authority than under the existing Commission form. It is not entirely clear to me that the various goals and objectives of these reforms are entirely consistent with each other.

I do not want to overstate the benefits of the Commission form. But I also think that we should not fall into the trap of thinking that a single administrator reorganization is a panacea for all of the NRC's problems. In the last analysis, I suspect that the quality of people selected to direct and manage the agency are more important than the organizational structure itself. I would also note that a single administrator organization structure can work effectively, and there are several good examples in government. And I would agree that the Commission form of organization can be frustrating at times, both to commissioners as well as to the Congress. Nevertheless, I continue to see some significant advantages to the Commission form.

First, I believe that the complex, wide-ranging, and often polarized policy issues which come before the Commission benefit from review by a group of people with diverse backgrounds, experiences, and perspectives. Properly implemented, the Commission form results in a more open and deliberative decisionmaking process in which competing views are aired and considered before reaching a conclusion. Such a process affords the public a greater opportunity to understand the significant issues which come before the NRC and to observe how their government is addressing those issues. Although the role of the NRC is shifting somewhat from a licensing agency to an agency that must oversee an industry with more than 100 operating nuclear power plants, the issues that come before the Commission remain complex and continue to present broad public policy questions that would benefit from a collegial decisionmaking process.

Second, with the Commission form, change occurs more gradually than is the case with a single administrator. Under the Commission form, only one of five members is typically replaced each year, providing a sense of continuity to the decisionmaking process. In addition, the Commission is served by a relatively stable professional staff, including the agency's senior technical managers. In contrast, with a single administrator, there is likely to be a more rapid turnover in personnel, not only at the top of the organization but also in what have traditionally been the senior technical staff positions. These more rapid changes are likely to lead to wider and more rapid swings in policies and to a loss of continuity. The nuclear industry argues that it has special needs for predictability and stability. Recent experience indicates that as much as 10-15 years are required to plan and build a nuclear power plant, which is then expected to operate for a period of 40 years or more. Given these durations and the industry's arguments for predictability and stability, I am not convinced that the single administrator form best serves the particular needs of this industry.

Third, the single administrator form also creates some interesting difficulties. One example is the licensing responsibility for high-level radioactive waste storage and disposal facilities. There is an obvious difficulty in giving one Executive Branch single administrator authority to make a licensing decision on an application proposed by another Executive Branch single administrator and recommended by the President. As is the case with the Environment Committee bill, one can end up with the situation in which a final decision on a major issue such as the licensing of a high-level waste repository will be made at a lower level within the agency and not by the agency head, or at least with the authority of the agency head to review the staff decision being severely limited.

The principal argument advanced by the proponents of a single administrator form has traditionally been that a single administrator will lead to better management and greater efficiency and accountability than is the case with the Commission form. Although there is always room for improvement in these areas, I believe that improvement can be achieved by other means within the Commission structure. One alternative, for example, is to strengthen the role of the chairman as the day-to-day manager of the NRC staff and as the initiator of policy proposals to be considered by the Commission. My sense as an outside observer over the past year is that Chairman Zech has moved in this direction. This approach would maintain the benefits of a collegial decisionmaking process, would ensure continuity, and would avoid the inevitable disruptions of a major agency reorganization. Still another alternative would be to reduce the size of the NRC from five members to three, although I tend to favor the stronger chairman alternative.

Mr. Chairman, for these reasons, I believe that there are significant advantages to the Commission organization form for the NRC which justify its retention. At the same time, I believe that there are alternatives within the Commission structure to accomplish the perceived benefits of a single administrator structure without its disadvantages.

TESTIMONY OF
PETER A. BRADFORD, CHAIRMAN
NEW YORK STATE PUBLIC SERVICE COMMISSION

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON GOVERNMENTAL AFFAIRS

ON THE
COMMITTEE ON ENVIRONMENTAL AND PUBLIC WORKS
COMMITTEE WORKING PAPER
REGARDING THE
NUCLEAR REGULATORY REORGANIZATION
AND REFORM ACT OF 1988

MAY 12, 1988

Good morning, I am Peter Bradford. I am Chairman of the New York State Public Service Commission.

I have been a state utility regulator since 1971, except for five years (1977-1982) on the NRC. I have chaired the Maine and New York Commissions and am the immediate past president of the National Association of Regulatory Commissioners. However, I am not appearing today on behalf of any of those organizations.

I have testified on the single administrator concept before, always in opposition. Copies of that testimony are attached. Basically, I have opposed such legislation because it "solves" problems that nuclear power does not have, while distracting from the real problems that have beset this technology for decades. It will not improve nuclear safety, and - without that - it neither will nor should enhance public confidence.

The question worth examining today is whether the events of the last few years have produced greater justification for the single administrator concept than that which existed when Congress wisely rejected the idea in the aftermath of Three Mile Island. The only relevant changes that come to mind are the virtual end of the NRC's reactor licensing function and the makeup of the Commission itself. Of these two, the first merits serious discussion.

Multi-member regulatory agencies at the State or Federal level are inherently less streamlined than single administrators. In return, they tend to be somewhat more impervious to executive branch control and to sudden change, as well as more open to public scrutiny. In addition, when running smoothly, they offer the potential that several heads will be wiser than one. It is this latter characteristic, coupled with the stability inherent in the fact that their multi-member character resists sudden change with a new administration, that commends them in situations calling for adjudicatory wisdom and predictability.

Because of the fundamental shift in the NRC's mission from the reviewing of license applications to the overseeing of operating reactors, it is valid to ask whether the Commission format is still sensible. The Commission structure was, after all, chosen in the years following World War II when the Atomic Energy Commission was given the solemn mission of overseeing the production facilities for the atomic and then the hydrogen bomb, as well as the nuclear navy. Peaceful uses were a very small part of the program, though a large part of its dreams.

Collegial wisdom, with its checks and balances, was prized. Public adjudication was not contemplated, for the first power plant was a decade away, and keeping nuclear secrets was viewed as being far more important than an open process.

Indeed, it was this penchant for keeping secrets that got the Commission in trouble when commercial reactor licensing did become part of its mission. The Commission classified a skeptical safety analysis of the Fermi I Breeder Reactor as "administratively confidential" in order to withhold it from the Governor of Michigan and the United Auto Workers who were questioning the wisdom of constructing it a short distance from Detroit.

In the ensuing debate, Congress set up what was for that era a remarkably open and extensive licensing process. In return, nuclear energy was exempted from any meaningful state controls and was also given the limitations of liability contained in the Price-Anderson Act.

Within a dozen years, the Atomic Energy Commissioners had set up the licensing board and the appeals board to deal with routine reactor licensing. Their own visions had more to do with spreading the benefits of nuclear power around the world, as well as moving rapidly to breeder reactors and reprocessing plants. Such mundane issues as reactor safety and waste disposal received unfortunately short shrift at the Commission level.

By 1972, the AEC was predicting that we would have 1,000 reactors by the year 2000, in addition to an evolving breeder and reprocessing technology. This would have required an adjudicatory licensing process capable of issuing a license per week for every week of those 30 years. In New York, the Long Island Lighting Company was planning for 19 nuclear units on Long Island. The two Seabrook Units were only a small piece of a 15 reactor program the New England Power Pool planned to complete within 15 years.

However, Congress grew increasingly impatient with the Atomic Energy Commission's unwillingness to take seriously the public's concerns about the safety of the relatively untried light water reactors. Serious questions about the workability of the emergency core cooling systems in the rapidly growing reactors, as well as general misgivings about mixing promotion with regulation combined to persuade the Congress to break up the Atomic Energy Commission.

While 80% of the AEC went into the Department of Energy, the Commission structure, together with the licensing and reactor oversight process, went to the Nuclear Regulatory Commission. Interestingly, not one reactor ordered after that date was ever built, and new orders ceased altogether by 1978. This result has, of course, little to do with the choice of a Commission structure.

It is the product first and foremost of economic forces followed closely by the Three Mile Island accident. The Commission itself, at least in its early years, was as monolithically determined as the AEC had been to keep the reactor licensing program going. Indeed, the public perception that that determination took precedence over resolving safety concerns contributed considerably to the growing community unacceptability of nuclear power plants. Nevertheless, with only a dozen operating licenses left in the pipeline, it is fair to ask whether the task of overseeing the safety of operating reactors is appropriate to the Commission structure. If that were the only issue, I think that the answer would favor the proponents of the single administrator. However, before moving in that direction, I think that the Congress must address the waste repository, export licensing, the possibility of future nuclear power plant applications, other necessary reforms and the preservation of a skeptical function in nuclear regulation. When you have done so, I think that you will find this legislation at least to be premature.

I say this despite the severe temptation to regard the single administrator proposal as a quick way to allow an incoming administration to sweep out the present NRC, which does little credit to the concept of the independent regulatory commission. It is not skeptical; it has no adjudicatory or policymaking sense of itself; it is rarely a source of independent perspective to the public or to the Congress; a majority of its members do not even believe that the jobs that they hold should continue to exist.

Nevertheless, the single administrator, especially one empowered to appoint a majority of the safety board, is the wrong answer. For one thing, it is no panacea, as the recent careers of Ann Gorsuch and James Watt, among others, have shown. For another, not all or even most regulatory agencies are paralyzed by squabbling, as the ongoing experience of the 50 states shows.

The present structure is not the source of the agency's problems. The structure did not cause investigative documents to leak to Middle South Utilities. The structure did not repeatedly frustrate Justice Department inquiry into potential criminal violations at the power plants. The structure did not harass employees who were pursuing safety concerns. And the structure did not make a fool of itself by adopting in the name of "realism" an emergency planning rule based on fantasy.

These were failings of attitude, and they would have loomed as large under an administrator. Only legislation requiring generic safety issues to be resolved by a fixed deadlines, requiring intervenor funding, and curtailing federal preemption would provide the kind of balanced incentive that would justify movement toward an administrator.

Even then, a separate licensing tribunal should be created for the waste facility and for export reviews, and the concept should be kept alive in the event that reactor licensing once again becomes a possibility.

To accept this legislation as it is is to endorse the proposition that the NRC's failings have been structural or, more plausibly, that whatever the source of its failings, the cure can be structural.

As you look back at the extent to which Congressional and public knowledge about nuclear regulation has so often come not from the chair and the staff but from individual commissioners, you can see why these bills in their present form cannot improve safety.

Testimony of Peter A. Bradford

June 18, 1986

Regarding the Regulatory Process for Commercial Nuclear Power Plants
Before the
Subcommittee on Nuclear Regulation
United States Senate Committee on Environment and Public Works

S. 1235, S. 2291, S. 2471

In order to prescribe for a sick patient, a doctor must first successfully diagnose the illness. Legislating is similar except that you must consider not only the disease itself but also the conflicting views of the public both as to the nature of the disease and the desirable remedy, which makes the task even harder. In diagnosing the Nuclear Regultory Commission, it seems reasonable to begin by completing a sentence beginning, "The trouble with the Nuclear Regulatory Commission is that it ....".

In order to make this task easier, let me make it multiple choice. The possible answers include the following:

A. Issues licenses too slowly.
B. Issues licenses too quickly.
C. Issues licenses at all.
D. Is too easily swayed by public opinion.
E. Pays no attention to public opinion.

E. Is too willing to impose expensive requirements that contribute little to safety.

F. Lets the economic interests of the nuclear industry override serious safety concerns.

G. Acts as a debating society whose oft publicized differences of view keep the public unduly worried about nuclear safety.

Because these possible diagnoses differ so widely, have their own vehement adherents and require such different remedies, a sensible doctor or legislator would review the symptoms carefully before prescribing. A substantial segment of the public feels itself to be unduly threatened by some combination of the accident and the economic risks of nuclear power plants. Are the plants really too dangerous and/or too expensive? Or do they just appear that way? Has the Nuclear Regulatory Commission taken too many risks or too few?

The most important symptoms seem to me to include the following:

1. Events of serious safety and economic significance have taken place at U.S. nuclear power plants. Fortunately, the damage has been almost entirely economic, but the fact is that these units have surprised their owners, their builders and their regulators too often for comfort.

2. Despite the best efforts of the Department of Energy and the NRC, the waste question remains unresolved and is the subject of diminishing rather than increasing public confidence.

3. All of the nuclear power plants ordered since 1975 have been cancelled, some after expenditures of billions of dollars, and none in any case have been ordered since 1978.

4. The economics of nuclear power now appear to be unfavorable compared to almost all other sources of electricity, including coal.

5. According to a recent CBS poll, 68% of the American public now oppose constructing more nuclear power plants. A decade ago 71% thought that it was important to continue or expedite the constructing of new nuclear units.

My own diagnosis as to the common thread suggested by these symptoms is that this technology has led to too many unpleasant surprises. However much there is to be said on its behalf in terms of cost, diversity of supply, relative safety and comparison to the alternatives, the public is well aware that there is a remote possibility of a catastrophic accident. Against this background, they are not prepared to put up with a continuing series of events that suggest that the industry and its regulators do not completely know what they are doing.

Furthermore, neither power company executives nor the Wall Street financiers who traditionally handle utility stock and bond issues were remotely prepared for the economic problems that their nuclear commitments have visited on them in recent years. These economic surprises are every bit as responsible for the current lack of interest in new nuclear units (or even in completing units on which hundreds of millions of dollars have already been spent) as the safety concerns.

The root cause of these surprises is that this industry grew much too fast in terms of its actual operating experience between 1965 and 1975. During this period, the regulators were single-mindedly devoted to expanding the uses of nuclear power and to overseeing the transition to reprocessing and to breeder reactors. When the lessons of operating experience began to roll in - such as the pipe crack problem, the Brown's Ferry fire, various types of fuel failures, steam generator tube problems and the inadequacy of seismic design - terribly expensive lessons had to be applied in plants that were well under construction. Significant problems in terms of waste management and nonproliferation received little attention. Offsite emergency planning received virtually none. Operator training and control room design were underestimated as were hydrogen control, quality assurance and the qualification of equipment to withstand an accident environment.

Some of these shortcomings came to light at Three Mile Island. Others showed up in malfunctions at other plants. Still others emerged as the result of testing and analysis. This process cost billions of dollars and destroyed the substantial public consensus in favor of nuclear power that existed a decade ago.

* * *

Against this background, what were the strengths and weaknesses of the three bills before you?

It seems to me that S. 2291 and S. 2471 have one shortcoming in common. They both seek to do for the NRC what a capable NRC ought to be doing for itself. In so doing, it seems to me that they distract attention from the absolutely crucial question of who is appointed to serve on the NRC.

As to S. 2291, the extent of this weakness seems to me to be fatal. The NRC really does not bear the same relationship to nuclear power plant operation that the FAA (with its extensive operational responsibilities) bears to airline safety. The NRC was itself supposed to function as a nuclear safety board toward the nuclear industry. It has its own Advisory

Committee on Reactor Safeguards and its own internal capability for investigating operational errors, mishaps and accidents. With all due respect to the bill's sponsors and their legitimate frustrations with the NRC's response to Salem and other problem areas, I do not think that another independent agency to oversee the NRC is likely to be an effective response.

An administration committed to nuclear safety will make its priorities felt in its appointments to the NRC itself. Lacking this commitment, any administration's appointments to the Safety Board will not be effective. The distance of the Safety Board from day-to-day regulation may at first make it less defensive of conventional wisdom and practice, but this is not likely to be an enduring advantage. The only circumstance in which a safety board makes much sense to me is if the Congress enacts the single administrator agency proposed in S. 1235.

I am not personally familiar with the workings of offices of Inspector General. While S. 2471 is vulnerable to some of the same criticisms as S. 2291, it has some offsetting virtues. For one thing, it would put an end to the deplorable hash that the NRC has made of its Office of Inspector and Auditor. For another, it might improve both the way in which the NRC conducts investigations and the NRC's continuingly difficult relationship with the Justice Department. For another, because it will not be a separate board with competitive overtones, it is less likely to bog nuclear regulation down in bureaucratic warfare.

In an ideal world, S. 2471 would not be necessary. The divergence of views among the commissioners together with the independent inputs from the ACRS and the licensing boards, to say nothing of Congressional oversight and public intervention, would be adequate to assure that the NRC itself discharged the functions of an office of inspector general. Since that has not happened and shows no serious prospect of happening in the near future, I think that S. 2471 deserves your favorable consideration.

As to S. 1235, with its proposal to replace the existing Commission by a single administrator, I can understand and sympathize with this measure as an expression of frustration with the current NRC. Senator Simpson's statement in introducing this bill is a fair and clear analysis of problems that do exist at the NRC. However, I do not think that the proposal will work as intended for several reasons.

First, I don't think that it gets at the underlying causes of the problems of nuclear power. The reasons for that view were set forth in some testimony that I gave several years ago in the wake of the original recommendation by the Kemeny Commission in this direction and President Carter's followup reorganization plan. I have attached that testimony as Attachment A, and I will not repeat it further at this time.

Second, I am afraid that the proposed change substitutes reorganization for a more fundamental change in approach. While it might buy a grace period of sorts and improve NRC morale, depending on the person actually appointed to head the agency, the failure to make more fundamental changes in approach would inevitably mean a return to today's situation within a year or two.

Third, a single administrator agency would inevitably slow the flow of information to both the Congress and the public. If you look back over the last decade, I think that you will inevitably come to the conclusion that much of what the outside world learns about the internal workings of the NRC comes in the form of separate views expressed by one or more commissioners in disagreement with the majority's course.

Fourth, that part of the public that is unenthusiastic about nuclear power will mistrust the motivation for this bill. I come from a state in which nuclear power is a source of continuing and exceptional controversy. Twice in the last five years referenda to shut down Maine's only operating nuclear power plant have gotten more than 40% of the vote. A third such effort in 1987 seems likely. There is no way that I can imagine the replacement of the existing Commission by a single administrator serving to diminish that level of public concern, and it may enhance it.

Fifth, I don't think that the alternative of an effective collegial regulatory commission has ever been given a fair trial at the NRC. A collegial agency is almost inevitably less efficient that a single administrator and it does mask accountability both at the Commission level and between the Commission and the President. However, it has offsetting strengths if its members are chosen for their competence and their ability to work together as a team. This can only occur if the chairman is a figure capable of commanding broad public respect for his or her previously demonstrated commitment to nuclear safety and if that individual is actively consulted as to other appointments whose talents, views and backgrounds are a constructive supplement to those of the chair. This formula has never been tried at the NRC to my knowledge.

Sixth, the single administrator approach inherently lacks the very stability that nuclear power urgently needs. Because the individual in charge can be replaced following a presidential election, the swing from a president strongly supportive of nuclear power to one who is more skeptical could produce quite a sudden change of regulatory direction of just the type that a commission structure insulates against. If the financial community had to factor into its existing analysis the likelihood that President Reagan might be succeeded by one of the announced Democratic candidates with considerably cooler views toward nuclear energy and that the nuclear regulatory climate would change dramatically overnight, nuclear power's prospects would not be improved.

There is something of a middle ground between the existing Commission and S. 1235 that I think has much to commend it. That middle ground consists of reducing the NRC to 3 members. Having served on both a five member and a three member commission, I have found that the potential for discord is much less in a carefully chosen three member agency supplemented by a Public Advocate or an Office o Public Counsel. The only difficulty at the federal level - but it is a substantial one - is that the Sunshine Law as currently written would prohibit any two of the members from ever meeting informally to discuss any aspect of agency business. I don't think that the benefits of the Sunshine Law are so great as to preclude its being modified to permit the reduction of several of the federal agencies to three members permitted to have nonpublic discussion of agency business. Maine's Sunshine Law offers wide latitude for informal discussion among the three commissioners as long as the discussion does not seek to decide pending cases, and our working relationship is much better than the overall intracommission climate at the NRC.

I have on other occasions made a number of proposals that I think would strengthen the regulation of nuclear power and make it more publicly acceptable. These include the modification of the current federal preemption of the states from any say in nuclear standards and the adoption of either a public counsel's office or a program of intervenor funding for the NRC. I have attached a talk that sets forth some of these approaches in more detail. They are sufficiently far removed from anything in the legislation before you that I will not reiterate them now. Packaged together with S. 2471 and S. 1235, they might conceivably command broad support.

I would be glad to work further with this Subcommittee on that basis or in any other way that I can be helpful.

Attachment 4

TESTIMONY OF
COMMISSIONER PETER A. BRADFORD
BEFORE THE
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

April 18, 1980

I agree fully with the Commission testimony that you have just heard. My purpose in elaborating on it is to question the premise underlying the Reorganization Plan, namely that the problems at the NRC come in some substantial part from the agency's structure. Or, to put the proposition in a way that insults history and the public intelligence a little less, whatever the causes of the NRC's problems, the structure impedes their resolution in some fundamental sense.

You must begin with the fact that nuclear power and nuclear regulation experienced a serious accident that revealed specific weaknesses. Operators were insufficiently trained; mishaps at individual plants were being insufficiently analyzed for generic implications; emergency planning had been regulated as if it didn't matter; small breaks in the integrity of the primary cooling system had not been thoroughly studied; instrumentation was inadequate; and reactors had been sited too close to large populations. No study - not Kemeny, not Rogovin, not GAO, not the industry, not the intervenors - has alleged that these failures flowed from the fact that the Chairman of the NRC lacked necessary powers. Such a claim would be ridiculous, for no example has yet been given of an NRC or AEC chairman who was prevented by the agency structure from taking a step to improve the public safety. In fact, the record shows the reverse. It shows that the Commission concluded early in the game - by this I mean basically the late 1960's and early 1970's - that adequate fundamental levels of safety had already been attained and that the principal challenge (made explicit by an AEC forecasted need of 1000 reactors by the year 2000 and by the priorities of the Congress' Joint Committee on Atomic Energy) was to develop a licensing system capable of issuing some 40 construction permits and 40 operating licenses per year over the last two decades of this century while overseeing the commercialization of large scale reprocessing plants and breeder reactors.

In this environment, the raising of new safety concerns was no way for an AEC staffer to get ahead, especially in light of the seige mentality induced by occasional intervenor court successes and the emergence of perceptible public skepticism. To have objected to the issuance of a license because of inadequate operator training or emergency planning or small break loss of coolant analysis would have put a staffer's career very much at odds with the explicit "Don't turn over new rocks" type of guidance that came down from the agency's higher levels. On several occasions, the Atomic Energy Commissioners chose not to know or not to disclose information tending to raise safety-related doubts about the nuclear licensing program.

For example, in the late 1960's, the AEC explicitly chose not to receive letters from its Advisory Committee on Reactor Safeguards on the subjects of reactor siting in populated areas and failures in the primary system, in substantial part because of adverse impact on the industry and potential public "misunderstanding." At the same time, a study showing adverse consequences greater than previously realized from a major reactor accident was labeled "incomplete" and withheld for eight years until the FOIA forced its release. In the mid-1970's, citizen petitions detailing the inadequacy of emergency planning around reactor sites were rejected.

I mention these examples to show how serious a misconception can arise from the acceptance of the proposition that the safety shortcomings revealed by TMI are merely the inadvertent consequence of an unwieldy management structure. Until recently, something very different was at work. The regulatory agency was as resolutely managed as any in America, but it was managed on the fundamental premise that adequate levels of safety had already been attained. It is in the firm application of that premise, not in the images and rhetoric of mismanagement or non-management underlying this plan, that you will find the roots of the accident at Three Mile Island. The agency was not undermanaged. It was misdirected, and the corrective measures for that problem are not the ones before you.

* * *

If the historical perspective that I have outlined is as valid as this Committee thought when it disbanded the AEC, then you are certainly entitled to wonder why both the Kemeny Commission and the Rogovin Report (as well as the Administration) have put so much emphasis on strengthening the Chairman as a cure for the agency's problems. I think that there are three basic explanations.

First, there is the desire for a comprehensive, easily understood and publicly presentable solution to profound technical complexities and difficult issues of institutional responsibility. Recommendations for single administrators and strengthened chairmanships have a simplistic public appeal in a climate that yearns for decisiveness.

Second, these reviews have tended to focus almost exclusively on the last three years and have learned little from history. The recent past was a period of profound national ambivalence regarding nuclear power. Even before Three Mile Island, extensive reassessments were underway of the waste problem (the Interagency Review Group), the proliferation implications (the International Fuel Cycle Evaluation), low-level radiation dangers (a cabinet Task Force), reactor safety (the Lewis Review), and nuclear economics. In addition, the NRC was growing away from its earlier stepchild relationship to the promotional side of the AEC. In short, nuclear regulation was like a very large ship changing direction from a full-speed-ahead twenty year course. Studies made while the bow was swinging would naturally have difficulty discerning a clear direction.

No one would urge that having five captains is more decisive than one - and I expect that Governor Babbit and Mr. Rogovin will join the Administration in regaling you with solemnly irrelevant examples of particular failings - but even they would have to have very short memories to urge a return to the kind of decisive authority that had the vessel aimed straight at the rocks five years ago. Furthermore, the "five captains" rhetoric is itself misleading, for it is only in the rarest of circumstances that the NRC faces decisions of the ship captain sort.

The third explanation is that reorganizing avoids responsibility for particular shortcomings. To the limited extent that the Commission's problems flow from Presidential appointments or the lack thereof, a ringing recommendation to reorganize is a useful distraction.

The fact is that the way to reorient or revitalize a Commission is to appoint a coherent and predictable majority that includes the Chairman. That is what this Administration did at the Civil Aeronautics Board, the Interstate Commerce Commission, the Federal Trade Commission and the Tennessee Valley Authority (the latter being a large agency with extensive operational responsibilities whose Chairman has less statutory authority than the Chairman of the NRC has today). What was done at the NRC, by contrast, is analogous to hitching teams of horses to different points around a wagon. The fact that the wagon then makes uneven progress tells you nothing about its structure and only a little about the relative strengths of the horses. It does raise questions about the intentions of the wagonmasters, questions that are not resolved by today's proposal to cut the rations of four of the horses and to feed the difference to the fifth.

One cannot compensate for the absence of a clear majority by changing the law to allow the Chairman to shape the agency to suit his position even if he is in a minority. If the basic authority and tone of the agency and its top employees is not to come from a majority of the Commission, then even the single administrator proposal, wrong though it is for other reasons, would be preferable. Otherwise you will create a situation in which the general public thinks it is protected by a Commission while the real level of protection is more likely to be determined by future chairmen and their sponsors in the Department of Energy.

In conclusion, the plan is to be praised for avoiding two serious errors. It does not opt for a single administrator and it does not change our export licensing responsibilities. It is also helpful in setting forth clear guidance on emergency management. On another track, the Administration has been very helpful recently in our effort to consolidate our nine separate buildings scattered over Washington and suburban Maryland into a single location. This effort seems to me more important by far than any other in tightening NRC administration.

The plan's failings come from a misstating of history and, I am sorry to say, from the Department of Energy's continuing failure to understand the need for the NRC to stand on its own ten feet if nuclear decisions are to be sound and credible. The necessary revisions that we have proposed are not major in form, but they will preserve what is best in the plan while restoring the balance within the agency. Without them, this plan has a potential for discord that could please only those who are really prepared to see nuclear power stalemated on into the future through indecisiveness.

Attachment B

TESTIMONY OF
COMMISSIONER PETER A. BRADFORD
U. S. NUCLEAR REGULATORY COMMISSION
BEFORE THE
HOUSE INTERIOR SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
AND THE
HOUSE GOVERNMENT OPERATIONS SUBCOMMITTEE ON ENERGY, ENVIRONMENT AND NATURAL RESOURCES

MARCH 12, 1982

HELPED TO PRICE NUCLEAR POWER OUT OF THE MARKET. PUBLIC CONCERN OVER WASTE AND UNRESOLVED SAFETY ISSUES MADE NEW UNITS DIFFICULT TO SITE. THE ATMOSPHERE AT THE NRC BECAME SUFFICIENTLY OPPRESSIVE THAT A NUMBER OF EMPLOYEES LEFT OR SPOKE OUT IN PROTEST. THE NRC ITSELF HAD TO WITHDRAW THE EXECUTIVE SUMMARY OF ITS HIGHLY PUBLICIZED SAFETY STUDY.

TO EMBRACE POLICIES LIKELY TO MAKE THE 1980'S A RERUN OF THE 1970'S SEEMS TO ME TO BE AS ANTINUCLEAR A COURSE AS THE PRESIDENT COULD HAVE CHOSEN. THIS IS NOT TO SAY THAT NUCLEAR POWER IS GOING TO HAVE AN EASY TIME IN THE 1980'S IN ANY CASE. OUR STAFF SEES AS MANY AS 19 MORE PLANT CANCELLATIONS AS LIKELY. NEW ORDERS ARE NOT LIKELY WITHOUT A SUBSTANTIAL PERIOD OF ACCIDENT FREE OPERATION, A GENERAL DROP IN CAPITAL COSTS, A LARGER RATE OF GROWTH IN ELECTRICITY DEMAND, VIABLE ASSURANCE AGAINST THE CLEAN-UP AND PERHAPS REPLACEMENT POWER COSTS OF MAJOR ACCIDENTS, RENEWED INVESTOR CONFIDENCE, AND A PUBLIC WILLING TO HAVE PLANTS SITED IN SOME COMMUNITIES.

I HAVE SEEN ENERGY POLICY CHOICES REVERSED AND REVERSED AGAIN OFTEN ENOUGH SINCE 1970 THAT I WOULDN'T RULE OUT A MODEST UPTURN IN NUCLEAR POWER PROSPECTS LATER IN THIS DECADE, BUT EFFORTS TO FORCE SUCH A CHANGE SOONER WILL BE COUNTERPRODUCTIVE. IT MAY NOT HAPPEN IN ANY CASE, BUT IF IT DOES, THE FOLLOWING ARE IMPORTANT ELEMENTS IN A SENSIBLE PRONUCLEAR POLICY:

- FUTURE PLANTS WOULD HAVE TO SURVIVE AN HONEST AND THOROUGH NEED FOR POWER ANALYSIS.

- SITES SHOULD BE CHOSEN, REVIEWED, AND BANKED IN ADVANCE OF ACTUAL NEED. THEY SHOULD ALSO BE SUFFICIENTLY REMOTE TO PERMIT FULLY EFFECTIVE EMERGENCY PLANNING.
- PLANTS SHOULD BE STANDARDIZED UNDER PROVISIONS THAT ALLOW SAFETY IMPROVEMENTS IF OPERATING EXPERIENCE SO DICTATES.
- LICENSING PROCEEDINGS FOR EARLY SITE REVIEW AND STANDARD DESIGNS SHOULD INCLUDE FINANCIAL AND/OR TECHNICAL ASSISTANCE TO QUALIFIED INTERVENORS SEEKING TO RAISE GENUINE SAFETY ISSUES IN GOOD FAITH. THIS IS NOT SYNONYMOUS WITH BLANKET INTERVENOR FUNDING, BUT IT DOES IMPLY A GOVERNMENT WILLING TO RECOGNIZE THE LIKELIHOOD THAT PAYING SOMEONE A SMALL AMOUNT TO BE SKEPTICAL NOW IS LIKELY TO AVOID MUCH GREATER RISKS IN THE FUTURE.
- STEADY PROGRESS TOWARD A LONG-TERM WASTE REPOSITORY LICENSEABLE UNDER THE TECHNICAL CRITERIA PROMULGATED BY THE NRC IN 1981 SHOULD CONTINUE, AND FUTURE POWER PLANT LICENSING SHOULD BE CONDITIONED BOTH ON THAT PROGRESS AND ON THE AVAILABILITY OF INTERIM STORAGE CAPACITY.
- THE PRICE-ANDERSON ACT LIABILITY LIMITATIONS ARE TWO DECADES OUT OF DATE AND NEED TO BE INCREASED BY AT LEAST A FACTOR OF FIVE, WITH THE AMOUNT BELOW THE CEILING FUNDED EXCLUSIVELY BY THE INDUSTRY.

- Technologies dependent on a need for separated plutonium (i.e., breeders and reprocessing plants) should not be pursued until effective safeguards are possible and need is clearly established, which probably means never.

- Government-wide research on low-level radiation effects, particularly on effective registry of nuclear worker exposures, should be revived.

- The NRC should set an upper limit to the number of power plant operating licenses and construction permits that it can issue within a given budget. The boom and bust cycles of 20 plants one year and two or three a year or two later are disruptive of steady work on unresolved safety issues. Safety issue deadlines need to be taken as seriously by the NRC and by its oversight committees as possible licensing delays.

- Lastly, a point that is not confined to nuclear power, there is a need for greater sanctions throughout the government for the misinforming of the high-level decisionmakers. One need only consider last spring's licensing hoax, which distracted large segments of NRC and Congresional attention. Furthermore, during the Carter Administration and, I'm sure, today as well internal debates over both reactor and export licensing produce some extraordinary efforts from within the government to tilt the process toward outcomes desired by DOE or the State Department.

> The efforts that I know of were not agency-wide, and they certainly didn't involve all the individuals dealing with nuclear policy. However, some of them were flagrant, and, as far as I know, none were punished.
>
> What seems to be missing is a sense that there is no greater bureaucratic misdemeanor than seeking to mislead the presidential or congresional decisonmaking process. It is to be expected that, within limits, those outside the government will function primarily as private advocates, but the willingness of those within the government to do so has caused nuclear power a good deal of its trouble and cannot be condoned in a sensible nuclear future.

At present it is possible to postulate futures in which we will want to have more nuclear power available, and it is possible to postulate those in which we will not. The NRC has come a long way since 1977, primarily because of Three Mile Island, but this progress is not irrevocable. It is worth recalling the warning of Murray Kempton about public policy generally as we look to the future of nuclear regulation and nuclear power. He wrote, "Most chapters in the history of debates over public policy end with the conquest of truth by needed belief. Man seems correctible only by events and then only transiently, because the lesson of events is all too soon recorrected by inextinguishable myth."

IF NUCLEAR REGULATION WERE TO RESPECT ITS SKEPTICS AND CRITICIS INSTEAD OF SEEKING CONSTANTLY TO SHUNT THEM ASIDE, THIS TRAGICOMIC AND COSTLY CYCLE MIGHT BE BROKEN. THIS SEEMS TO ME TO BE THE BEST HOPE FOR A SENSIBLE NUCLEAR FUTURE, BUT IT DOES NOT SEEM TO ME TO HAVE EVEN A 50-50 PROSPECT OF OCCURRING IN THE PRESENT CLIMATE.

Testimony of Victor Gilinsky
before the
Committee on Governmental Affairs
May 12, 1988

Mr. Chairman and Members of the Subcommittee:

The proposed legislation before you on reorganizing the Nuclear Regulatory Commission would replace the Commission with an executive agency headed by a single administrator; it would also create an independent Nuclear Reactor Safety Investigation Board. My comments concern the Safety Board. I have two points: (1) that the independent Safety Board is an essential part of this package if we are to improve the present state of affairs, and (2) that some of the bill's detailed provisions would impede the proper functioning of such a board and should be modified.

The reasons for a nuclear safety board are obvious. There has of course been such an entity watching over commercial aviation for fifty years, finding probable causes of events and making recommendations for improvements. You have proposed such a board to cover nuclear activities in the Energy Department. On the commercial nuclear side, as well, we need to have a better means for learning from our mistakes, whether they are made by industry or government. There needs to be a group, independent of those with line responsibility for nuclear licensing and regulation, which writes a report on the industry's and the agency's safety performance. This notion has not been accepted easily by the NRC's (or its predecessor's) line management. An Office of Operations Evaluation was created in the early 1970s to carry out this function, but was soon eliminated. A similar Office for the Analysis and Evaluation of Operational Data, created after the Three Mile Island experience, has maintained a low profile. The Commission's Advisory Committee on Reactor Safeguards has not been able to play this review role satisfactorily because of its own involvement in power plant licensing. I believe the problem calls for a legislative solution.

The change from a five-member commission to a single administrator makes the independence of the Safety Board even more important. The proposed centralized management offers advantages of executive efficiency and clearer accountability. At the same time it would likely mean greater central control over information and a narrower spectrum of views on safety within the agency. To balance this tendency, we shall need a safety board that is fully independent -- to ensure it is entirely free to pursue needed investigations and to make recommendations, even if that means displeasing the administrator. That is the essential point.

I would not therefore have the new administrator appoint any of the Board members. The bill before you provides (Section 142 (b)) that two of the three Safety Board members would be appointed by the new administrator. To do so would allow the administrator to choose a majority of the reviewers of his/her performance, and it would set the stage for conflict between the Board chairman and the administrator's appointees.

I would also not fix in law the detailed scope of the Board's investigations. The bill currently specifies that the Board would investigate events whose safety significance exceeded a threshold specified in Section 143 (a). It is too difficult to capture in legislation the subtleties of nuclear safety. As to what is significant enough for the Board to investigate, Congress should look to the good sense of the Board members, who would after all be appointed (in accordance with Section 142) on the basis of "technical qualifications, professional standing, and demonstrated competence and knowledge...." To further promote competence and continuity of approach to safety investigations, I would extend the Board members' terms to six years.

STATEMENT OF MARCUS A. ROWDEN

Mr. Chairman and Members of the Committee:

My name is Marcus A. Rowden, I am a partner in the law firm of Fried, Frank, Harris, Shriver & Jacobson, resident in the firm's Washington office.

Between January 1975 and June 1977 I served as one of the first five Commissioners of the newly established Nuclear Regulatory Commission, and between April 1976 and the expiration of my term on June 30, 1977, I was the Commission's Chairman.

The Committee has asked for my views on an array of issues relating to pending legislative proposals to alter the organization of the NRC and its offices.

Change to A Single Administrator

The most far-reaching of the organizational measures before the Committee would supplant the current collegial management of the nuclear regulatory program with management by a single administrator. I have long been an advocate of such a change. In testimony over the past several years before committees of both the Senate and the House, I have strongly supported a change to single administrator management. The Commission structure, in my view, has proved itself seriously flawed despite the dedicated efforts of conscientious persons -- including the present NRC Commissioners -- to make it work effectively.

I do not propose to recount in these brief remarks the multiple reasons for my position. Two years ago, I prepared a series of reports for the Edison Electric Institute on the historical roots and ensuing development of the commission structure for nuclear regulation -- a report which identified and examined what I saw as the major deficiencies in collegial management of the nuclear regulatory program (Report on the Management Structure of the Nuclear Regulatory Commission, Prepared for the Edison Electric Institute). This report was made part of the record of the hearing earlier in this session before the Senate Environment and Public Works Committee, and I understand it will also be offered for inclusion in the hearing record of this Committee.

To state my conclusions in capsule form: the commission structure impedes effective agency management; impairs policy planning and regulatory decisionmaking; and -- most important of all -- it defeats clear authority and accountability for agency performance. To that I would add that nothing in the ensuing two-year period has given me reason to alter those views. Indeed, I note that, since then, the universe of those advocating single administrator manegement has grown increasingly larger.

I believe the basic approach to single administrator restructuring embodied in Title I of the Nuclear Regulation Reorganization and Reform Act is sound; and I would hope that its legislative realization can be achieved during the present Congress.

I do have a comment on an issue which was raised during the Committee's April 27 hearing on this proposal -- namely, whether the administrator of the proposed Nuclear Safety Agency should serve for a fixed term and, relatedly, whether that term should be different in its commencement and termination (that is, "staggered") from that of the appointing President.

I believe that a fixed term would insulate the administrator, and the President who appoints him, from political accountability for agency performance -- an accountability which, as I see it, is a central purpose of single administrator restructuring. A "staggered" term would exacerbate that failing. Moreover, a fixed term for the head of an Executive Branch agency would be a radical departure from established governmental practice. That practice is sound and should be maintained. A President should be able to appoint as the agency's head someone who is representative of his administration's policies, who would serve at the President's pleasure, and for whose performance the President would be accountable. Senate confirmation and Congressional oversight

-- together with regulatory procedures prescribed by the Atomic Energy Act and Administrative Procedure Act -- provide meaningful safeguards against the "politicizing" of the regulatory agency's processes and decisions; and a strong professional staff will provide the underpinning for continuity in the regulatory program.

Other Proposed Organizational Changes

The Nuclear Regulation Reorganization and Reform Act proposes other organizational changes to the NRC in conjunction with the establishment of single administrator management: creation of an Inspector General for the agency; statutory status for its Office of Investigations; and establishment of an independent Nuclear Reactor Safety Investigations Board.

Before commenting briefly on each of these, let me state the central factor in my evaluation of the structural changes this bill proposes. I strongly believe that responsibility for nuclear safety regulation should reside in a single regulatory body -- one which possesses the authority, resources and expertise to discharge its safety mandate and which is accountable to the political branches of government for its performance. That, to me, is at the heart of any move to single administrator management for the nuclear regulatory program. Establishing other agencies or entities with conflicting, duplicative or overlapping regulatory missions is a prescription for contention, confusion and regulatory instability -- none of which serves the interests of safety, let alone that of good government.

With that as a benchmark, I turn to the several proposals for collateral changes to the nuclear regulatory organization that the Committee has before it.

Office of Inspector General.

I have no difficulty with the concept of a Presidentially appointed official who would perform for the nuclear regulatory agency the conventional functions of an Inspector General -- investigating fraud, waste and corruption within the agency and among its contractors. In the past, such a post has been limited to the Cabinet Departments and the larger government agencies. If that is what the Congress desires for the nuclear regulatory agency, the most sensible way to achieve it, in my view, is by amending the Inspector General Act of 1978 to include that agency within its provisions. This is the course charted in the Inspector General provisions of the Nuclear Regulation Reorganization and Reform Act and in S.908, the Inspector General Act Amendments which the Senate adopted earlier in this session.

Office of Investigations.

I am not convinced of the need for giving statutory status to the Office of Investigations (OI); and I am opposed to any measure that would lessen the supervisory authority of the agency's head over this staff office. The Office of Investigations performs functions for the nuclear regulatory agency which are integral to the discharge of its licensing and regulatory responsibilities. It would be counterproductive for an agency that has those responsibilities not to have control of a function needed for their exercise.

Any statutory provisions defining the organizational status and functions of OI must maintain the ability of the head of the nuclear regulatory agency to set the priorities for and supervise the operation of this office. The OI provisions of the Nuclear Regulation Reorganization and Reform Act are not sufficiently clear on that point; and I would urge that the administrator's paramount supervisory authority be made explicit.

Nuclear Safety Board.

A variety of legislative proposals have been put forward in both the House and the Senate for the creation of what has come to be called a nuclear safety board. While the composition and functions of such a board are as varied as the number of proposals themselves, I have yet to see a legislative proposal that I can support since each transgresses in significant measure the essential principle of centralized responsibility for nuclear regulation.

Objective safety investigation is, unquestionably, an important element of an effective and credible nuclear regulatory program and I would support statutory means for its enhancement. I must oppose, however, safety board proposals that would undermine the unitary authority of the nuclear regulatory agency.

In my judgment, the safety board provisions of the Nuclear Regulation Reorganization and Reform Act create the nucleus for another nuclear regulatory body. In form as well as substance, this board would be an independent commission. Though ostensibly an organizational component within the Nuclear Safety Agency, its chairperson and other members would serve for fixed terms and be removable only by the President for specified causes. The board would have funding and staff of its own, would operate independently of the administrator's direction or supervision, and would have lines of reporting responsibility which run directly to the Congress. Paradoxically, such a parallel body -- and collegial at that -- would be created as part of a reorganization whose paramount purpose is centralizing regulatory responsibility and accountability.

I do not believe that the National Transportation Safety Board (NTSB) provides an apt analogue, given the promotional and operational roles played in air transportation by the Department of Transportation and the FAA -- roles which are excluded for the nuclear regulatory agency. In short, I see no valid public policy reason why nuclear safety investigation -- if that is to be the primary purpose of such a board -- cannot be effectively and objectively carried out by the nuclear regulatory agency itself.

If Congress should decide to create such a statutory investigative function, I would urge that it be made part of the Nuclear Safety Agency and that the Agency's head be given supervisory authority to assure that the board's efforts complement and do not conflict with the Agency's regulatory responsibilities. I would also recommend that this organizational component be headed by a single official, rather than a collegial body. I question the value of collective authority and responsibility in investigative matters. The objective of timely and accurate factfinding and reporting -- investigation's proper role, as I see it -- can better be realized under the direction of a single official.

Reform of the Licensing and Regulatory Process

I would betray my own convictions, Mr. Chairman, if I did not conclude with a plea for reform of the licensing and regulatory process at the same time the Congress addresses structural reform. Organizational change is only one side of the nuclear reform coin; the process itself is badly in need of change. Those changes are well known and broadly supported -- standardization, pre-approval of designs and sites, and a single-stage licensing process. Legislation already introduced in the House (H.R. 4134) rightly combines organizational and process reforms -- the proposed process changes being consistent with those contained in legislation submitted by the NRC itself (H.R. 2106). I understand that a like proposal for process reform (one built on the ethic of standardization) will shortly be introduced in the Senate. This, in my judgment, marks the proper course for meaningful reform legislation to follow.

I thank the Committee for the opportunity to contribute my views and would be pleased to respond to any questions.

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UNITED STATES SENATE

COMMITTEE ON GOVERNMENTAL AFFAIRS

Testimony of

ELLYN R. WEISS
GENERAL COUNSEL
UNION OF CONCERNED SCIENTISTS

May 12, 1988

Nuclear Regulatory Commission Reorganization

Thank you for the invitation to appear today to discuss a variety of measures proposed to reorganize the Nuclear Regulatory Commission (NRC).

The Union of Concerned Scientists (UCS) applauds the efforts by the Chairman and members of this committee to address serious problems at the NRC. As I will testify, we believe that the measures before this committee reflect a consensus that the NRC today is not functioning in a manner that assures Congress and the public of the safety of nuclear power plants or of the integrity of the regulatory process. We believe that a package can be fashioned that would improve NRC and begin rebuilding public confidence. But UCS also strongly believes that reorganization and structural reform alone is not enough and I would like to begin by explaining why.

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Vulnerability of Mark I Containment Structures

The first example involves the agency's consideration of measures designed to reduce the risk of containment failure in a severe accident for the U.S. plants which are known to be most vulnerable - the 24 boiling water reactors built by GE with a Mark I containment design. NRC's most recent research - which simply confirms and quantifies what has been common knowledge for years - shows that, should a severe accident occur, the small, pressure-suppression Mark I containment has up to a 90% probability of failure. Given the inherent unreliability of probabilistic risk assessment techniques, it is probably most fair to say that, should a severe accident occur at one of these plants, the containment is as likely as not to fail. See generally, NUREG-1150, "Reactor Risk Reference Document," Draft for Comment Feb., 1987.

Prior to the accident at Three Mile Island, NRC had generally responded to such concerns by taking the position that severe core damage events were so improbable as to be "incredible," and that protection against the consequences of such events therefore need not be considered. This attitude was severely criticized by the President's Commission on the Accident at Three Mile Island (The "Kemeny Commission").

> After many years of operation of nuclear power plants, with no evidence that any member of the general public has been hurt, the belief that nuclear power plants are sufficiently safe grew into a conviction. One must recognize this to understand why many key steps that could have prevented the accident at Three Mile Island were not taken. The Commission is convinced that this attitude must be changed to one that says nuclear power is by its very nature potentially dangerous, and, one must continually question whether the safeguards already in place are sufficient to prevent major accidents.

Report of the President's Commission on The Accident at Three Mile Island, Oct. 1979, p. 9, emphasis added.

It is worth noting in contrast to the currently popular (albeit inaccurate) characterization of NRC as an agency which was too quick to impose backfits on licensed plants, that the Kemeny Commission correctly criticized NRC for making too few "backfits" to licensed plants:

> The old AEC attitude is also evident in reluctance to also apply new safety standards to previously licensed plants.

Id. at 20. See also 53-54.

After the accident at Chernobyl in April, 1986, two of NRC's top regulators decided that the time had come to do something to decrease the risk associated with the Mark I plants. Harold Denton, the Director of the Division of Nuclear Reactor Regulation and Robert Bernero, Director of Boiling Water Reactor Licensing, devised a strategy of five modest safety improvements calculated to reduce the risk of a catastrophic radiation release from 1 in 2 core melts to 1 in 50, a risk reduction of 25 times. The calculated cost was in the range of $500,000 to $3,000,000 per plant. This is a trivial cost; it is the equivalent to what an average utility may pay for replacement power for a 10-day shutdown. Compared to the human and economic costs of a large radiation release, it is obviously tiny.

At the time these modest improvements were proposed, these top NRC safety officials were widely quoted along the following lines:

> Questions concerning whether the Mark I containment would withstand a severe accident have taken on new importance following the Chernobyl disaster, Denton said. . .
>
> "We can argue about the probability of severe core damage for a long time," Denton said. "I think the political climate is such that people are willing to concede that maybe they (severe accidents) will happen now and then at U.S. plants, despite the best efforts of everyone. But they want to know it won't turn into the Chernobyl-type event."

"Inside NRC," June 9, 1986, pp 1,3.

> "We have badgered ourselves with severe accident analysis," [Bernero] said. "For six years we have analyzed the subject to death and we haven't made a change at a single plant. That's ridiculous."

"Inside NRC," Sept. 29, 1986, p.1.

Denton and Bernero pushed throughout 1986 and 1987 for the NRC to require the Mark I owners to make the inexpensive changes. (During the same period of time the French, Germans and Swedes went ahead with similar and in some cases more extensive backfits to their plants' containment systems, even to PWR containments which are substantially more reliable than the Mark I's. See, e.g., "Inside NRC," July 20, 1987, p. 1) In the U.S., however, the cost-benefit mindset contained in the backfit rule took hold.[1] The NRC staff announced that, if the owners did not voluntarily agree to the changes, the agency would have to do a cost-benefit analysis. "Inside NRC," Aug. 18, 1986, p. 3.

It is perhaps not surprising that the following then took place: The vast majority of Mark I owners did not voluntarily agree to make safety improvements; Victor Stello, Executive Director of NRC, blocked the proposal by sending it back for more cost-benefit calculations; and both Denton and Bernero were transferred out of NRR to jobs where they can have essentially no influence on this decision.

The nuclear industry trade papers reported the following on January 5, 1987:

> Bernero's activism has made him unpopular with nuclear utilities and vendors, and industry sources say there has been pressure from the industry to remove him from his current position particularly since he has taken an

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[1] Bernero was quoted as saying that while he believed the Mark I modifications "could be exempted" from the backfit rule because they would clearly increase safety, he was unwilling to allow the modifications to be delayed by a dispute over how to interpret the backfit rule. "Inside NRC," June 9, 1986, p. 3.

increasingly strong stand on the need for Mark I fixes. "Inside NRC," Jan. 5, 1987, p. 10. At a commission meeting on July 15, 1987, the staff announced that it no longer advocates the safety improvements proposed after Chernobyl. Instead there will be further study. In fact, the decision that the cost-benefit test under the backfit rule would be applied to this situation was the death knell for any significant action to improve Mark I safety, as it will be for any significant safety improvement at any plant. That is because the cost-benefit methodology mandated in the rule has been calculated by NRC to justify no more than a few million dollars expenditure per plant, no matter how great the risk being addressed. The calculation is explained in detail in NUREG-1150, Reactor Risk Reference Document, Chapter 8, February, 1987, and its effect is summarized by NRC as follows:

> Of particular note, however, is the fact that even given the large uncertainties associated with any estimated averted risk, the maximum amount of money that could be justified for backfit consideration, on cost-benefit theory alone is limited to a few million dollars, considering only offsite costs and about $20 million, considering both onsite and offsite costs.

Id at ES-19, emphasis added.[2]

A growing body of experimental and analytical evidence demonstrates a Mark I containment is almost certain to fail in the event of a severe meltdown accident. However, senior NRC officials appear to be making efforts to avoid taking any action to reduce that risk. According to published reports, members of the NRC believe their jobs will be in jeopardy if they support technical positions opposed by the nuclear industry:

> "There are some senior [NRC] staff members who are doing everything they can to make sure the game is played by industry's rules," said one source. "They are trying to downplay the Mark I steel liner issue even

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[2] The rule does not require consideration of on-site costs (i.e. the cost of losing the nuclear plant). See proposed 10CFR 50.109(c), 50 Fed. Reg. 38112 (cols. 2-3) and Separate Views of Commissioner Asselstine, Id. at 38108, Col. 2, Sept. 20, 1985.

> though the [nuclear industry's] analysis has been torn apart. If the industry can win this one, they can win everything."

"Inside NRC," Feb. 15, 1988, p. 13.

In February, 1988, NRC held a workshop on the Mark I containment problem. The view expressed by virtually all non-industry personnel, including scientists at the National Laboratories, was that the probability of failure of Mark I containments has not been over-stated and that the industry's more sanguine views are based on unreasonable assumptions.

There is no prospect - barring clear direction from Congress or an accident at a GE plant - that the NRC will do anything effective to reduce what we believe is an intolerably high risk of catastrophe at a GE Mark I plant.

Lack of Shutdown Guidelines

One of the agency's most striking deficiencies is its failure to promulgate guidelines for determining when a plant's safety violations are so serious that it should be shut down. The NRC is an agency that has the authority to order shutdowns when safety problems pose an undue risk to the public, but as the August 1987 GAO Report released by Senator D'Amato states, "NRC lacks guidelines to determine when to shut a plant down." The report also states that despite thousands of safety violations each year, "NRC headquarters does not consolidate the information to evaluate safety trends and/or determine the status of corrective actions taken by the utilities."

Little Opportunity for Public Participation

Another problem area is the lack of avenues for public participation in proceedings which determine how protected the public is to be. The public now has a statutory right to participate in adjudicatory hearings prior to licensing whereas no such meaningful opportunity exists for the 40 years after the license has been granted. This is important because there are numerous instances after licensing where safety hazards are discovered either through research or operating experience. Currently, utilities may claim a hearing to challenge the necessity for any safety improvement, whereas the public is prohibited from questioning the sufficiency of the improvements.

I have only mentioned a few chronic problem areas needing reform, but there are many more. If these conditions are permitted to persist at the NRC, then the Congress cannot assure the American people that U.S. nuclear power plants are operating safely.

Legislative Remedies Are Needed

How can the deficiencies be remedied? According to the Kemeny Commission's investigation report on the TMI-2 accident:

> To prevent nuclear accidents as serious as Three MIle Island, fundamental changes will be necessary in the organization, procedures and practices -- and above all -- in the attitudes of the Nuclear Regulatory Commission and, to the extent that the institutions we investigated are typical, of the nuclear industry.

No reorganization or legislative direction can, by itself, instill the proper attitude of an arms-length regulator. We are convinced that there is no magic bullet -- no special statutory language or simple management reorganization -- that will ensure that the NRC treats protecting the public safety as its overriding obligation. We believe that the best hope for enhancing safety lies in creating a better system of checks and balances, improving public participation, and increasing Congressional vigilance of NRC's rulemaking, standard-setting and general operations.

Certainly part of the problem is institutional, as the various NRC reform proposals now before this committee recognize. The NRC staff put its official stamp of approval on each currently licensed plant and is responsible for reviewing those still in the pipeline. To concede that a safety problem was overlooked at any plant raises questions about the safety of other plants and about the quality of the agency's own judgment. This is a powerful disincentive to early and open airing of safety issues.

Therefore, independent checks and balances are needed to provide a counterweight to this institutional dynamic. The independent Nuclear Safety Board and the Inspector General, if properly set up, help provide that counterweight.

We have stated in the past that the idea of converting the NRC to a single administrator agency is misguided. We still question its value and are concerned that it could seriously erode public access to the agency's decision-making, take the public's business behind closed doors, and increase the already unhealthy dominance of the agency's agenda by the regulated industry. At a time when we are increasingly forced to rely on whistleblowers and Freedom of Information Act requests to get at the truth, converting the NRC to a single administrator agency could remove what little sunshine we are currently afforded by the commission system.

Yet we have also come to realize that the commission system is no panacea either. While the ideal structure for the NRC would, in our view, be a genuinely collegial commission with diverse views and backgrounds whose members understood that their overriding obligation is to the public safety, not the short-term interests of the nuclear industry, it may just be too late to revive that model. Recognizing this, let me address your specific questions.

1. The advantages and drawbacks of the change to a single administrator agency:

The advantages are increased efficiency and accountability. The disadvantages are a loss of diversity of viewpoints and a loss of public access to decision-making caused by non-applicability of the Government in the Sunshine Act and by the removal of the public's business even further behind closed doors. Since it is our view that the nuclear industry already enjoys an unhealthy dominance over the NRC, we find this aspect of the single administrator concept most troubling. If this structure is adopted, we would like to work with the committee to fashion some means to mitigate this effect, such as, for example, requiring the Administrator to keep a published docket of all matters before him or her for consideration and to maintain publicly-accessible files containing the material submitted to the Administrator's office in connection with each matter.

In addition, we are very concerned that reorganization could subject the agency to the control generally exercised by OHB over the work of such agencies. While we do appreciate the need for increased accountability, we believe that a call for greater efficiency or "effectiveness" is largely misguided; NRC's problem is not that it can't get the trains running on time, its that they're on the wrong tracks.

2. The proposed relationship of the new NSA to the remainder of the executive branch:

Any agency regulating nuclear power must be free of OMB oversight or control over its regulations. The authority to set safety standards free of the cost-benefit balancing and other forms of control imposed generally by OMB on other agencies in recent years must stay with the regulatory body, no matter how reconstituted. The U.S. Court of Appeals has held that the Atomic Energy Act requires NRC determine what is necessary for public safety free of cost-benefit considerations. That principle must stand.

3. The proposed mandate, placement, membership and operation of the Safety Board:

The creation of an independent Safety Board is a needed reform, whether or not the agency is reorganized to a single administrator. The Board should be made up of Presidential appointees subject to Senate confirmation and empowered to investigate accidents, near-misses and patterns of events and to make recommendations to the NRC for the steps to address their root causes and prevent recurrence. The NRC is institutionally ill-suited to conduct and follow-up investigations because of the inherent conflict of interest involved when the agency investigates its own conduct. This conflict is presented in virtually every case, since NRC's conduct is implicitly or explicitly in question whenever an accident occurs. For example, the Kemeny Commission found that the agency's failures were at least as significant a contributor to the TMI accident as any other cause. This has continued to be the pattern in subsequent investigations.

In order to be at all useful, the Safety Board must be truly independent. If it is not independent, it would be better not to have it at all. In addition, it should have a scope of jurisdiction broad enough to enable it to make recommendations which could prevent accidents, rather than simply conducting after-the-fact investigations of cause. In view, the Committee Working Paper is deficient in both respects.

The Board is not independent. It is set up within the agency, two of its three members are appointed by the Administrator and are apparently removable by him or her at will and it must "consult" with the Administrator and provide a written justification to him before it can initiate an investigation. It is nothing more in reality than another arm of the agency. Such a Board would not remotely achieve the stated goal of restoring public confidence in this agency, nor would it provide any meaningful balance to the administrator's authority.

In addition, the Board may only act if there has been a) a release of radiation, b) a "major degradation of essential safety-related equipment" or c) a "major deficiency in the design, construction, use of, or management controls" at a nuclear plant. This limits the Board to acting either when a very serious accident has already taken place or when the Board knows in detail before an investigation has even begun facts that are not knowable until after an investigation, such as precisely what equipment has malfunctioned or the degree to which design, construction or management failures were at fault. This threshold is so restricted as to obviate one of the basic purposes of an independent Safety Board -- to identify and investigate precursors so that action may be taken before a serious accident imperils public safety.

In general, the provisions of the working paper seem deliberately designed to emasculate the Safety Board at the outset.

4. The proposed relationship and powers of the Office of Investigation (OI) to the single administrator, the remainder of the NSA, and the Department of Justice.

The creation of a stable, strong, arms-length investigatory and enforcement arm at NRC is long overdue, with or without the reorganization. This Committee deserves great credit for bringing to light the sorry history of the agency's remarkable and unceasing efforts to frustrate its own investigators. The provisions of Subtitle C of the Committee Working Paper would not achieve the necessary reform.

First, the Director of Investigations would be removable at the will of the Administrator and does not have the authority to appoint and control his own staff. Not only must he be constantly wary of putting his own job at peril, his office can be emasculated, as it is currently, by failure to provide sufficient staff and resources to do the job.

Moreover, the Administrator can stop any investigation in its tracks by making an unspecified and generalized determination that "public health and safety requires otherwise." We cannot imagine a circumstance where public health and safety would legitimately demand the termination of an investigation. Again, this provision seems designed to bring OI under the control of the Administrator.

In addition to moving on the NRC structural reform bills, additional Congressional activity is necessary to strengthen public protection. The Energy Reorganization Act should be amended so that not only is NRC required to report on unresolved safety issues but to resolve them. Also, given the GAO's finding that NRC lacks guidelines for determining when safety violations warrant shutting down a plant, Congress should require the promulgation of such guidelines and direct that NRC follow them.

In conclusion, the establishment of a single administrator agency in the place of the commission may streamline operations and focus responsibility. However, it would not, even if combined with a Nuclear Safety Board, IG and independent OI, fix the fundamental problems of the agency -- a lack of will to resolve safety problems and aggressively enforce regulatory standards. It will not make the agency more receptive and responsive to public participation. And it will do nothing to remedy the agency's regulatory shortcomings as identified in the September GAO report. If Congress is dissatisfied with the job the NRC is doing, the answer must go well beyond structural changes. Congress must vigorously oppose the NRC's attempts to weaken public safety and restrict public access. It must insist on reasoned, objective guidelines for determining when safety improvements are needed and when operating plants pose undue risk to public safety.

Congress should direct NRC, within a specific period of time, to order measures to mitigate the unacceptably high probability of failure of the Mark I containments, including deadlines for completion of the required changes. Congress should also direct NRC to undertake a program to reduce the overall probability of core melt at U.S. plants. (In April of 1985, the Commission told Congress that the probability of a severe core melt accident at some U.S. plant in the next 20 years is about 45 percent.)

We believe there is no quick fix for the NRC. We support the establishment of the independent IG, a strong, independent OI, and a truly independent safety board, and we recognize some of the benefits that could be gained from a single administrator. But these can only be considered the first step toward getting the NRC and the industry to meet higher standards. We hope this Committee's efforts on structural reform expand to a review of the guidelines, standards, and regulations which the agency uses to circumvent its public safety mission.

STATEMENT OF EDWARD M. DAVIS

Mr. Chairman and members of the Subcommittee, I appreciate your invitation to appear here today to discuss reorganization of the U.S. Nuclear Regulatory Commission and comment on a number of related bills. I am Ed Davis, President of the American Nuclear Energy Council. My statement is presented on behalf of the American Nuclear Energy Council and the Edison Electric Institute. ANEC represents over 100 companies having an interest in nuclear energy, including investor-, public-, and cooperatively-owned nuclear utilities, manufacturers, architect-engineers, uranium mining companies, nuclear waste management firms, and various other firms engaged in the nuclear fuel cycle. EEI is the national association of investor-owned electric companies. Its members serve approximately 73 percent of all ultimate electricity customers in the nation. They operate 96 nuclear plants and currently have five additional units under construction.

INTRODUCTION

In your letter of invitation, Mr. Chairman, you requested the views of the nuclear energy industry on a number of issues related to pending legislative proposals to restructure the NRC or its offices. The Committee's focus is whether NRC's current structure permits it to discharge its responsibilities most effectively and efficiently.

It is appropriate and timely for the Congress to take a hard look at the organizational structure of the NRC and related aspects of the nuclear regulatory program. The NRC, in its present form, has been managing the nuclear regulatory program for over a dozen years; the regulatory program itself is now some thirty years old; and both the Commission and the regulatory program are confronted by serious challenges.

Therefore, we understand the desire to consider whether organizational or other program reforms are needed and, if so, whether they will bring about worthwhile improvements -- ones that will advance nuclear safety and further the program as a whole. We welcome the opportunity to contribute our views.

I want to underscore certain principles that shape the nuclear industry's position. Foremost among them is the need to assure that any change to the NRC structure is compatible with safety interests. Coupled with this is the clear recognition that, if we are to have a viable nuclear program, we must assure that there is an effective, credible nuclear regulator. The nuclear industry's broad-based efforts to upgrade performance through self-improvement and to pursue aggressively industry-wide operational excellence -- the mission of the Nuclear Management and Resources Council (NUMARC) and the Institute of Nuclear Power Operations (INPO) -- are not intended to supplant regulation but to complement it and thereby advance the safety goals which both NRC and the nuclear energy industry share.

In keeping with those basic precepts, we urge that, in considering organizational changes ---

- Modification of NRC's management or office structure should not simply be reactive to problems of the moment. Any changes should be legislated only after thorough consideration of the operational consequences for the agency and for the regulatory program.

- There should be no piecemeal approach to organizational change. Proposals addressed to individual NRC offices or functions should be considered in the context of the best overall structure for the agency.

- NRC should not be "cannabilized". Change should not disperse or dissipate the agency's regulatory resources.

- Change should not result in duplication of NRC's regulatory functions.

- And, change should not produce confusion of regulatory authority. NRC, or any successor agency, must be maintained as the sole body responsible for safety regulation of nuclear power activities. Indeed, the centralization of nuclear regulatory authority -- and accountability — should be the keystone of all organizational changes made.

It is important to add, moreover, that many of the problems that have inspired reorganization proposals were produced by a licensing and regulatory process that long ago ceased to match technological capabilities, safety aims, and national needs. That process should be reformed at the same time Congress tackles organizational change. The needed reforms are well-known and widely-endorsed: standardization; pre-approval of designs and sites; and a consolidated construction permit and operating license process.

PROPOSED ORGANIZATIONAL CHANGES

CHANGE FROM A COMMISSION TO A SINGLE ADMINISTRATOR

The most far-reaching of the restructuring proposals would replace the Commission with a new agency headed by a single administrator.

While the full burden of NRC's operational problems cannot be attributed to its management structure alone, there is no avoiding the fact the NRC has been repeatedly frustrated by the limitations that structure imposes.

We also have come to conclude that the present collegial structure of the NRC should be replaced by a single administrator. This has not been a reactive conclusion. We looked long and hard at the question of the most appropriate NRC management structure. In 1984 and 1985, a series of three reports were prepared for the Edison Electric Institute by Marcus A. Rowden, a former Chairman of the Nuclear Regulatory Commission. The first report examined the history of the NRC structure and the resulting managerial problems; the second scrutinized the arguments supporting and opposing a commission structure for NRC and the major management alternatives; and the third report analyzed the issues raised by any change from a commission form of management to one of a single administrator. While these reports do not specifically recommend a preferred management structure, they do conclude that single administrator management offers significant features conducive to achieving greater effectiveness in regulatory operations.

These reports, in our view, constitute valuable background material in considering the issues now before the Committee. They have been combined into a single volume, entitled Report on the Management Structure of the Nuclear Regulatory Commission, prepared for the Edison Electric Institute, and with your permission, Mr. Chairman, I would like to submit that report for the record of this hearing.

ADVANTAGES OF A SINGLE ADMINISTRATOR

The single administrator form of regulatory management offers several distinct advantages over a commission structure.

(1) Improved Management. Replacing the five member Commission with a single administrator, most observers agree, would significantly improve the agency's management. A single administrator, who alone would possess full responsibility and authority for agency operation, would be able to manage the agency more effectively and make decisions on a more timely basis than a collegial body in which authority and responsibility are diffused. This was the conclusion of the post-TMI Kemeny and Rogovin studies, both of which recommended scrapping the commission format for that of a single administrator. The evolving nature of nuclear regulation reinforces the need for improved management, since managerial decision-making is central in a program that is focused on regulating the safe operation of nuclear power plants rather than licensing new facilities.

(2) Improved and More Timely Policy Formulation. A further major criticism made by post-TMI studies, including one conducted by the GAO, was

that the Commissioners failed to effectively control regulatory policymaking. Faced with the inter-personal and institutional obstacles inherent in arriving at consensus positions -- including Sunshine Act restrictions -- the Commission in too many cases confronts the dilemma of either having inordinate delays or letting policy-making fall by default to action by the regulatory staff on a case-by-case basis.

(3) Clear Accountability. A third major deficiency of the current NRC structure -- and, from a public policy standpoint, perhaps its most disturbing one -- is that, by diffusing responsibility it diffuses accountability. As contrasted to the current collegial situation, where no one individual is in charge, a single administrator -- and the President who appoints that official -- would be fixed with unmistakable accountability for agency performance. And in government as well as in business, experience tells us that accountability is a powerful motivator and safeguard.

OPPOSING ARGUMENTS

Several major concerns have been expressed about single administrator management for NRC and we think they are worth examining.

(1) Loss of Diversity. A principal argument advanced in support of the present commission structure is that it provides for diversity in decision-and policy-making. Proponents contend that the controversial nature of nuclear issues warrants a collegial body to reflect differing viewpoints. But, as the post-TMI Rogovin report declares:

> "The desire for 'diversity' in part mistakes what we believe to be the proper roles for the regulatory agency, the Executive, and the Congress in our nuclear safety program. We do not believe the proper function of the Commission resolve competing public attitudes about nuclear power in every individual safety decision that is made. It is precisely this hidden pressure that has played an important role in paralyzing the Commission in the past few years. Decisions about the ultimate safety objective in the regulatory

> program, and about the expansion or reduction of our country's reliance on nuclear power -- decisions which inevitably involve a balancing of the risks against the benefits of this technology -- should ultimately be made by the Executive and the Congress, as part of the Nation's overall strategic energy policy."

(2) Public Visibility. It has also been argued a single administrator would reduce the public visibility of the policymaking process. A single administrator, clearly, would not be subject to the restrictions of the Sunshine Act. We do not think this decisive, however, in terms of the openness of the regulatory process. NRC rulemaking would continue to be conducted under the public notice and comment procedures mandated by the Administrative Procedure Act. Moreover, the licensing and regulatory process, as a whole, would still be as open as it is today to public scrutiny. Licensing issues would continue to be aired in public hearings; technical issues would continue to be ventilated in public meetings of the agency and of its Advisory Committee on Reactor Safeguards; the agency's practice of making virtually all of its papers publicly available would still continue; and, of course, the Freedom of Information Act would continue to apply. Furthermore, we would fully expect Congressional oversight would continue to be vigorous and ongoing. In short, the nuclear regulatory process would remain the most open and visible process pursuant to which the government's business is conducted.

(3) Regulatory Program Stability. There is a third major concern about a single administrator structure -- the resulting potential for instability in the regulatory program since agency management and policies would be subject to change with each new administration. This concern should be tempered, however, by a recognition of the practical constraints on radical change. Those constraints are inherent in the Presidential appointment and Senate confirmation process, in the massive regulatory infrastructure that

(experience shows) changes slowly when at all, and in the continuity of the professional staff that conducts the agency's day-to-day business. Moreover, we know full well that stability is not a necessary corollary of collegial regulatory management.

In summary, we support single-administrator management for the nuclear regulatory agency. However, we would offer some specific recommendations about the establishment of this new agency. First, we believe the restructured agency should be headed by only two political appointees -- the Administrator and Deputy Administrator; all other directors should remain career officials. We think this important to assuring apolitical management of the technical staff of the agency and stability in nuclear regulation.

Second, there must be appropriate transitional provisions in any legislation in order to assure continuity in agency operation and regulatory functions should the process of appointment and confirmation of an Administrator not [illegible] completed prior to the time the Act becomes effective. For example, the Nuclear Regulation Reorganization and Reform Act abolishes the NRC and creates a new agency, the Nuclear Safety Agency, one hundred and twenty days after the date of enactment, or on an earlier date prescribed by the President. We are concerned that in the event the Senate fails to act on a Presidential appointee within this time period, the NRC will be abolished, a new agency will be established in its wake, yet the agency will not have an single administrator. To cover such a contingency, we recommend the legislation provide that the official previously serving as Chairman of the NRC become the Acting Administrator of the agency pending assumption of office by the new Administrator. This should ensure an orderly transition from the Commission to the new agency.

Without an orderly transition between the NRC and the new agency, there could be unwarranted delays in licensing and other agency proceedings. Although the Nuclear Regulation Reorganization and Reform Act does include some provisions to protect licensing and other proceedings from delay or interruption due to no reason other than the transition between agencies, we believe additional measures may be necessary and appropriate.

Third, we are concerned about proposals to grant a fixed term to a single administrator. While we recognize that this proposal has been discussed in the context of enhancing the independence of the nuclear regulatory agency, we believe that this proposal raises more problems than it solves.

One of the main goals of legislative proposals to replace the commission with a single administrator is to focus accountability and responsibility in the administrator and the President who appoints that official. A fixed term for the administrator clearly defeats that purpose. Granting the single administrator a fixed term could allow an agency administrator to pursue a personal philosophy at the expense of nuclear safety regulation. Staggering the administrator's term to overlap Administrations would only exacerbate these failings. Instead of pursuing a personal philosophy regarding nuclear energy, the administrator is focused on the job at hand: improving nuclear safety regulation. We believe that the best protection against undue influence being exerted on the agency administrator by a President or another Administration official comes from the Senate confirmation and Congressional oversight processes and requirements for rulemaking and licensing decisions mandated by the Atomic Energy Act and the Administrative Procedure Act.

Granting a single administrator a fixed term which does not coincide with that of the President will not enhance regulatory stability. In point of fact, the stability of the regulatory program comes from the massive regulatory infrastructure created over the past 30 years and the continuity provided by the professional regulatory staff. That continuity is important and the industry has urged that it be maintained by limiting the number of political appointees for the agency.

We believe that nuclear safety regulation is too important to permit any individual to pursue his or her personal philosophy. A fixed term for an administrator of an agency would be a radical departure from established governmental practice. Commissions and other multi-member boards are typically granted fixed terms, whereas single administrator heads of agencies serve at the pleasure of the President. This is the case for all other public health and safety agencies, and we see no reason why it should not be the case for the nuclear regulatory agency.

PROPOSALS FOR OTHER ORGANIZATIONAL CHANGES

There are other proposals for organizational changes to the NRC, either independent of or in conjunction with the creation of a new agency headed by a single administrator. Among them are proposals to establish an Inspector General for the agency; as has been proposed by both the Governmental Affairs Committee and the Environment and Public Works Committee. Both committees have also approved proposals to provide statutory recognition and greater independence for the Office of Investigations. In addition, there are proposals to establish a Nuclear Safety Board with responsibility for conducting safety investigations and for performing other regulatory-related functions. We have comments to offer on each of these measures.

As a guiding -- indeed bedrock -- principle, we strongly believe that responsibility for nuclear power safety regulation should continue to reside in a single regulatory body, one which possesses the authority, resources and expertise to discharge its safety mandate and is accountable to the political branches of government for the exercise of that mandate. Establishing other agencies or functionaries with independent, cross-cutting or overlapping regulatory missions is a prescription for divided authority, confusion in safety matters and regulatory instability. Inconsistent or confusing regulatory signals detract from safety. Thus, care must be taken when establishing new entities, or making other regulatory changes, that authority is clearly delineated and properly circumscribed.

(1) LEGISLATIVE PROPOSALS TO CREATE AN INDEPENDENT INSPECTOR GENERAL.

The Nuclear Regulation Reorganization and Reform Act would create an independent Office of Inspector General (IG) for the nuclear regulatory agency, headed by an individual appointed by the President and confirmed by the Senate. To the extent that the functions of such an office are consistent with those provided for by the Inspector General Act of 1978 -- that is, responsibility for investigating waste, fraud and abuse within the agency or by its contractors -- these proposals should not diminish the effectiveness of nuclear safety regulation.

In our view, the preferable course for establishing an IG for the nuclear regulatory agency would be to amend the Inspector General Act of 1978 to include the agency within its coverage. This, in substance, is the course proposed by the Governmental Affairs Committee and the Environment and Public Works Committee. Moreover, the Senate adopted this approach when it passed S. 908, the "Inspector General Act Amendments" by unanimous vote.

In summary, we think it important for the Congress to assure that, if an independent Office of Inspector General is created for the nuclear regulatory agency, it be empowered to exercise only those functions which are accorded an Inspector General under the Inspector General Act of 1978.

(2) THE OFFICE OF INVESTIGATIONS.

Both the Governmental Affairs Committee and the Environment and Public Works Committee have approved legislation to grant statutory status and greater independence to the Office of Investigations (OI). We remain to be unconvinced of the need for OI statutory status and have serious reservations about provisions that would lessen the agency head's supervisory authority over such a staff office -- a particularly anomalous step in legislation designed to centralize agency authority.

If Congress, nonetheless, deems legislative treatment of OI to be desirable, we urge that any statutory provisions regarding its organizational status and functions maintain the ability of the head of the nuclear regulatory agency to set the priorities for and supervise the operation of this office. In also urging this, Chairman Zech has explained:

> "OI investigations are often important elements in our regulatory decisions and in our confidence in the adherence of licensees to requirements. By nature of its mission, OI must work closely with the NRC regulatory staff. An effective working relationship between OI and the staff is important because OI does not make judgments regarding public health and safety — instead, it produces investigatory information which is useful to those who are responsible for making regulatory decisions."

Given those regulatory realities, the head of the agency should retain the authority to set priorities for and exercise control over OI's investigative resources — and, of course, be fully accountable for the proper discharge of that authority. The Nuclear Regulation Reorganization and Reform Act appear to establish such a relationship.

(3) NUCLEAR SAFETY BOARD.

A number of the proposals to establish a Nuclear Safety Board would create a de facto nuclear regulatory commission, with responsibilities that would necessarily entail duplication or dispersal of functions performed by the nuclear regulatory agency. We believe this to be a seriously mistaken course, and one at odds with the main purpose of the NRC reorganization — the centralization of responsibility and authority for nuclear regulation.

We believe that such a Nuclear Safety Board would create either a parallel or a divided regulatory regime either of which would compromise nuclear safety. Thus, we strongly oppose creation of such a board.

Proposals for an independent Nuclear Safety Board are derived from the National Transportation Safety Board (NTSB) and its investigation of aircraft accidents. There are, however, pertinent differences between nuclear and aircraft safety regulation. The regulators of the latter — the Department of Transportation and the FAA — have promotional as well as regulatory responsibilities. Placement of the NTSB in either could therefore foster a promotional perspective that would be inappropriate for any aircraft accident investigative body. Further, the FAA plays an operational role in the nation's air traffic system; accordingly, the question of FAA culpability arising from that operational role is a present issue in aircraft accident investigations. Neither of these factors is present in the case of nuclear regulation. In short, there is no sound functional reason why nuclear safety investigation cannot be discharged effectively -- and objectively -- by the nuclear regulatory agency.

The establishment of a board that is independent of the regulatory agency would create a situation where a board regulates the regulator that regulates an industry. By the same logic, a similar board should be established to regulate the other public health and safety agencies. We think that such an independent board is no more appropriate in the case of the NRC than it is in the case of the eight other Federal public health and safety agencies.

There are compelling reasons for maintaining safety investigation within the nuclear regulatory agency: these investigations will require technical resources of the regulatory agency or the duplication thereof; investigations will have direct regulatory effects; and their location in a separate agency runs counter to the need for unitary nuclear regulation. All of this is inimical to the interests of nuclear safety.

We fully support the aim of assuring objectivity in the investigation of nuclear safety events. Realization of that aim enhances the integrity of nuclear safety regulation and protects the legitimate interests of the regulated industry. While we do not believe that a nuclear safety board is necessary for that purpose, if Congress chooses to create such a board, we urge that any enabling legislation ---

* Make the board part of the nuclear regulatory agency and accord the agency's head sufficient supervisory authority to assure that the board's efforts complement rather than conflict with the agency's regulatory responsibilities.

* Confine the board's functions to investigative fact-finding, causal determination and reporting thereon.

* Prescribe the criteria for triggering safety investigations -- criteria that assure a focus on matters are of true safety significance.

* Establish the office as a directorate rather than a board. A single director will be able to conduct safety investigations will more speed and vigor than a collegial body.

* Assure that the technical resources of the nuclear regulatory agency will not be duplicated or diluted. Such a board should have a small professional staff to provide investigation leadership, with the detailing of experts from the regulatory agency or elsewhere to fill particular investigations needs.

The Nuclear Regulation Reorganization and Reform Act meets some, but not all, of the five criteria noted above. First, the board is established as an independent office within the Nuclear Safety Agency, and includes provisions to ensure that safety investigations do not conflict with regulatory responsibilities. In particular, there is a requirement that the chairman of the nuclear safety board consult with the agency administrator before initiating a safety investigation. Although there is no requirement that the administrator concur in the investigation, this consultation should improve the coordination between the board and the agency. Moreover, there is a requirement that the board issue a written determination before initiating an investigation that should further improve coordination.

Second, the board functions are limited to accident investigations. Any role beyond this threatens to create a "shadow NRC" and erode confidence in the new regulatory agency. Third, the bill establishes statutory criteria that define "significant safety event" in order to focus the attention of the board on those incidents that genuinely merit safety investigations. Although we applaud the fact that the bill includes criteria, we believe that these criteria could be improved and recommend alternative criteria.

There are some proposals that would authorize the board to conduct safety investigations in any areas that it determines are "significant". We strongly oppose these proposals, and believe that they would not enhance nuclear safety regulation. It is important to give clear statutory direction to the board in order to focus its attention on incidents of genuine safety significance. Otherwise, the board may focus its efforts on incidents that receive a great deal of public attention, but are of doubtful safety significance.

Unfortunately, we also believe that the bill fails to satisfy the fourth and fifth criterion listed above. As stated above, we believe that this office should be structured as a directorate rather than a board. In safety investigation there is no need for collegial deliberation; the objective is to develop the facts, to understand them and to communicate them -- and to do this as quickly and as accurately as possible. Vesting this function in a single individual would avoid the acknowledged disabilites of a collegial body -- diffusion of authority, lessened efficiency and delay.

We also believe that the large permanent staff of the board is inappropriate, and that the proportions envisioned between permanent staff and consultants and suborned personnel should be reordered. Since the bill includes statutory criteria for safety investigations, the number of incidents which will be subject to investigation will vary from time to time. Moreover, the complex nature of the events being investigates will require differing kinds of expertise. Because of the complexity of commercial nuclear power facilities and the mix of skills required to design, construct, operate, and maintain such facilities, it is impossible to know in advance which disciplines will need to be brought to bear on any particular event warranting investigation. While such skills are available in an agency such as the Nuclear Safety Agency, with its several thousand personnel, it is unlikely the appropriate skills would be available in the permanent board staff.

In addition to the difficulty of having the appropriate disciplines available within the board on a permanent basis, there is the real concern that such highly qualified personnel might not have sufficient duties or responsibilities throughout the year and, more important, would not have the type of interchange with their professional colleagues which is necessary to remain on top of developments in the field. Moreover, the lack of challenging work assignments between investigations would prove to be a significant disincentive to the retention of the type of highly motivated employee needed to conduct meaningful investigations. With these thoughts in mind, we believe that what is needed is a permanent staff designed to provide investigation leadership. The investigation leadership could be augmented, as needed, by personnel from the Nuclear Safety Agency or consultants from outside the agency. This approach should provide the necessary expertise to conduct the investigations of significant safety events.

REFORM OF THE LICENSING AND REGULATORY PROCESS

Organizational reform of NRC should not be considered in isolation from the underlying regulatory program. Indeed, the two are closely interrelated. The failings of an outmoded process for licensing nuclear power plants have, in a real sense, sowed the "dragon's teeth" for many of the problems that confront the NRC and the nuclear industry today. Moreover, that process stands as a barrier to any disposition on the part of utilities to consider nuclear power as a practicable choice if energy and demand factors require significant additional generating capacity between now and the end of the century -- as surely will be the case. Accordingly, there is a need for the Congress to come to grips with basic deficiencies in the licensing and regulatory process at the same time it takes up structural reform.

The failings and frustrations of the current process have been extensively and painfully documented before the Congress. In fact, there have been twenty hearings before Senate and House committees and subcommittees on this issue over the past seven years. What is equally frustrating is that the needed process reforms are also well known and broadly supported -- by the industry and its regulators, and within the Congress where an exhaustive hearing record has been compiled. Yet these reforms are perpetually "next in line" on the legislative priority list.

Design standardization is the keystone to process reform; it offers the greatest promise for a more effective nuclear power program and regulatory process. But standardization needs a supportive legislative framework if it is to become a commercial reality -- a framework providing for preapproval of standard designs, advance approval of sites, and a consolidated construction permit-operating license for applications that reference standardized designs. The NRC has proposed legislation which would establish that supportive framework and legislation has been recently introduced in the House. Moreover, we understand that legislation with similar standardizaton and licensing reform goals will soon be introduced in the Senate. We strongly support the concepts in these bills, and urge the Congress to take action.

The Nuclear Regulatory Commission is taking steps to bring about administrative reform of the current process and we welcome and support its initiative. The NRC's 1987 Policy Statement on Nuclear Powerplant Standardization and its stated intention to move forward with the adoption of implementing licensing regulations are long-awaited, positive steps. Nonetheless, we believe -- as does the Commission -- that legislative action supportive of standardization is also required. Only legislation can give standardization and related process reforms the national policy imprint and continuity that their full implementation will require. We urge, therefore, that Congress move on this front as well.

CONCLUSION

The American public has demanding expectations of the nuclear power program -- and rightly so. It expects exemplary operational performance from the nuclear power industry; effective oversight by its regulators; and a regulatory process which is supportive of both requisites.

The nuclear industry is fully committed to meeting its performance obligations, through individual efforts and the collective efforts represented by INPO and NUMARC.

Effective regulation requires both a workable NRC organizational structure and a sensible regulatory process -- one matched to safety requirements, technical capabilities, and the nation's needs. In our view, legislative changes will be necessary to bring this about. However, we urge the Congress to resist piecemeal changes and consider comprehensive process as well as structural changes.

We welcome the opportunity to submit our views on the steps to be taken and we offer continuing cooperation in further Congressional consideration.

PREPARED TESTIMONY
SUBMITTED BY
UNITED STATES NUCLEAR REGULATION COMMISSION

TO

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

CONCERNING
RESTRUCTURING THE NRC

PRESENTED BY
KENNETH M. CARR
COMMISSIONER

SUBMITTED: APRIL 27, 1988

While I subscribe to most of the views of the Commission majority with respect to establishment of a "Nuclear Safety Board", a statutory Office of Investigations, and an Office of Inspector General, I wish to explain my reluctance to support current proposals, such as the bill reported out of the Senate Environment and Public Works Committee, to transform the Commission into an agency headed by a single administrator.

When I was appointed to the Commission I was aware that the Kemeny Commission and the Rogovin Special Inquiry Group, as well as all ~~previous~~ NRC Chairmen, were convinced that a single administrator would be preferable to a Commission approach to agency management. Additionally, my years of management experience in the U.S. Navy told me that authority and responsibility should be vested in a single agency head. However, after a little more than one and one-half years on the job as a Commissioner, I am not convinced that the proposed change in the NRC's structure would lead to any major improvement.

As the primary focus of the Commission changes from the licensing of new plants to the challenges posed by emerging safety issues from operating and aging reactors, policy decisions on these new issues may still benefit from the experience and talents of a diverse Commission membership. The same experience and talent can be brought to bear on the policy decisions to be made

ON THE EVOLVING GENERATION OF ADVANCED LIGHT WATER REACTORS AND ADVANCED REACTOR DESIGNS, SUCH AS THE DEGREE OF INHERENT SAFETY THAT THESE DESIGNS SHOULD HAVE. THESE POLICY DECISIONS WILL BE CRITICAL TO PRESERVING, SAFELY, ENERGY SECURITY FOR THE NATION THROUGH VIABLE ENERGY ALTERNATIVES. IN ANOTHER SPHERE, WE ARE EMBARKING ON THE LICENSING OF A GEOLOGIC REPOSITORY FOR DISPOSAL OF HIGH LEVEL WASTE AND SPENT FUEL. IN CONSIDERING THE COMPLEX POLICY ISSUES RELATED TO THIS FIRST-OF-A-KIND FACILITY, A COLLEGIAL BODY MAY BE BEST SUITED TO ULTIMATELY DECIDE THE ADEQUACY OF A SITE. THUS, I BELIEVE THAT THE ORIGINAL THINKING THAT THE PUBLIC IS BETTER SERVED WHERE SUCH IMPORTANT DECISIONS ARE MADE THROUGH A COLLEGIAL PROCESS IS STILL SOUND TODAY. I AM NOT CONVINCED THAT THE COMMISSION'S COLLEGIAL STRUCTURE UNDULY PROLONGS DECISION MAKING NOR DO I SUBSCRIBE TO THE VIEW THAT THE SUNSHINE ACT GREATLY BURDENS OUR ABILITY TO ACT AS A BODY.

IN MY OPINION, THE CHANGE TO A SINGLE ADMINISTRATOR MAY RESULT IN ONLY SMALL ENHANCEMENTS IN ADMINISTRATIVE EFFICIENCY WHICH MIGHT JUST AS EASILY BE ACHIEVED BY REAFFIRMING AND HONORING THE CHAIRMAN'S AUTHORITY TO MANAGE THE ROUTINE, DAY-TO-DAY ADMINISTRATION OF THE AGENCY. IN OUR OTHER ADJUDICATORY AND RULEMAKING ROLES, THE ADVANTAGE OF THE DIVERSITY OF BACKGROUND AFFORDED BY A 5-MEMBER COMMISSION MAY WELL OUTWEIGH THE DISADVANTAGES.

NONETHELESS, WHILE I DO NOT SUPPORT THE SINGLE ADMINISTRATOR CONCEPT, NEITHER DO I STRONGLY OPPOSE IT. YET IF, AS MANY PROPONENTS OF THE SINGLE ADMINISTRATOR CONCEPT ARGUE, THE OBJECTIVE IS TO FOCUS THE RESPONSIBILITY AND ACCOUNTABILITY OF THE AGENCY IN ONE CHIEF OFFICER, I BELIEVE SOME OF THE PROPOSALS BEFORE CONGRESS FAIL, FOR THE MOST PART, TO MEET THAT OBJECTIVE. BY PROVIDING FOR SO MANY POLITICAL APPOINTEES AT VARIOUS LEVELS, BY CREATING A SEPARATE SAFETY OVERSIGHT BOARD, BY FAILING TO ADDRESS THE NEED FOR INDEPENDENCE OF THE NEW AGENCY, SOME PROPOSALS THREATEN TO DIVIDE THE REGULATION OF NUCLEAR POWER INTO COMPETING FIEFDOMS MORE THAN THEY PROMISE EFFECTIVE REGULATION. I RECOGNIZE THAT THE LEGISLATION DRAFTED BY SENATORS BREAUX AND SIMPSON ADDRESSES SOME OF THESE CONCERNS, THOUGH THE BILL NEEDS FURTHER IMPROVEMENT AS THE COMMISSION'S TESTIMONY INDICATES. IN THE HOUSE, I NOTE THAT H.R. 4134 LIMITS TO TWO THE NUMBER OF POLITICAL APPOINTEES IN THE NEW AGENCY AND THEREBY MINIMIZES THE DIFFUSION OF AUTHORITY AND RESPONSIBILITY THAT COULD RESULT UNDER OTHER SCHEMES.

IF IT IS DECIDED TO RESTRUCTURE THE AGENCY, IT MUST BE DONE CAREFULLY AND THOUGHTFULLY SO AS NOT TO EXACERBATE THE PROBLEMS RATHER THAN SOLVE THEM.

United States Senate
WASHINGTON, D. C.

DANIEL J. EVANS
WASHINGTON

May 19, 1988

The Honorable John H. Glenn, Jr.
United States Senate
Washington, D.C.

Dear John:

In view of the telephone inquiry made to my office on your behalf, I would like to clarify for the record a question that you asked at a Government Affairs Committee hearing last Thursday, May 12. It concerns the handling by my staff of a draft GAO report on the U.S.-Japan Agreement for Nuclear Cooperation that was done for the House Committee on Foreign Affairs, chaired by Dante Fascell.

I understand that you asked a question at this hearing of Mark Rowden, a former NRC Commissioner, as to where he received the GAO report. He answered truthfully on the record that he received it from Philip Jones in my office, a legislative assistant who staffs me on nuclear energy issues.

I don't believe Mr. Jones acted improperly in giving a copy of the report to Mr. Rowden and asking for his analysis. The GAO report done for Mr. Fascell was unfortunately leaked to the press on or about March 10 by someone other than House Foreign Affairs Committee staff. The cover letter and main conclusions of the study were widely reported, both on the wire services and the trade press, on March 11. I enclose several articles for your reference. The Japanese wire services and newspapers also ran stories on the GAO report. Hence the conclusions of the report, as well as the cover letter from the GAO, were in the public domain before March 21, the day of Senate debate on S.J. Res. 241.

The conclusions of the GAO report were not consistent with the Administration's interpretation of the non-proliferation statutes. It was clear that such an analysis would be used by critics of the agreement. It is my understanding that your staff on the Government Affairs Committee had already received a copy of the draft GAO report sometime in early March, with the consent of Mr. Fascell's staff, on the understanding that it would be kept confidential until Mr. Fascell made it public at a hearing scheduled for late March. Both you and I were scheduled to testify at that hearing. I understand that Chairman Fascell wanted to take that 30-day period to consult confidentially with Administration officials and GAO on the draft report. Due to the Senate debate and vote on S.J. Res. 241 on March 21, however, Chairman Fascell cancelled the hearing and markup on its joint resolution of approval.

The premature release of the report to the press, according to Mr. Fascell's staff, appears to have occurred on the Senate side by a staffer opposed to the agreement. It was certainly not done by Mr. Jones. He certainly would not have released a report on the agreement to the press that was critical of the Administration's legal position. As you know, I strongly support the agreement, and, furthermore, that is not the way my office operates.

After the news articles appeared on March 10 and 11, Mr. Jones consulted with the staff of the House Foreign Affairs Committee about the accuracy of the news reports. After confirming their accuracy, he asked if he could receive a copy of the report and distribute a limited number of copies to interested Senate staff and experts. Mr. Fascell's staff sent a copy to Mr. Jones and did not object to limited distribution.

Mr. Jones anticipated that opponents of the agreement, such as yourself and Senator Cranston, would most likely quote extensively from the GAO/Fascell report during imminent Senate floor debate. He understood that your staff, and certain other staff opposed to the agreement, had reviewed the draft report. After receiving a copy of the report and the consent of Mr. Fascell's staff, he gave a limited number of copies to Senate staff members favoring the agreement. He also gave one to Mr. Rowden, who requested it in a meeting during the week of March 14, and asked him for an expert legal analysis. Mr. Jones also understood that the State Department was undertaking a legal analysis of the GAO/Fascell report.

I quoted extensively from Mr. Rowden's analysis during our floor debate, after stating my understanding that several Senate offices had reviewed the GAO/Fascell report. I inserted his analysis and that of the State Department's Legal Affairs Office into the Record during our floor debate. I also note that you quoted extensively from the draft GAO/Fascell report during that debate. It appears from the floor debate, S. 2631 (attached), that you received permission from Chairman Fascell to use whatever information necessary during our debate in the Senate.

I believe my staff acted quite properly in his handling of the draft GAO report once it had been released to the press. He asked and received approval from Mr. Fascell's staff to review and analyze the report. Chairman Fascell and his staff, of course, have the final authority on the use and distribution of such GAO reports done for his Committee prior to official public release.

I ask that you include a copy of my letter in the record of your hearing on May 12 following Mr. Rowden's response to your question.

Sincerely,

Dan

DANIEL J. EVANS
United States Senator

Enclosures

Reshoot & screen for yellow

CRITICS, SUPPORTERS OF U.S.-JAPAN PACT MANEUVER BEFORE HOUSE-SENATE VOTES

As NuclearFuel went to press, it was uncertain when key congressional votes on the new U.S.-Japan nuclear cooperation agreement would occur. A resolution of disapproval, S. J. Res. 241, could be brought up any time on the Senate floor. Although Senate supporters concede they probably cannot muster a majority to block passage of the disapproval resolution, they believe they do have enough votes (at least 34) to sustain a presidential veto of any disapproval resolution.

In the House, another hearing on the agreement scheduled for March 24 before the House Foreign Affairs Committee has been postponed until March 30. Rep. Stephen Solarz (D-N.Y.), a key member of that committee, has already indicated that he favors passing a resolution of approval with conditions that are acceptable to both the administration and the Japanese.

By most counts, Congress has until the end of April before the agreement enters into force automatically. Some critics of the agreement have suggested that they may try to pass legislation to "stop the clock," and thus prevent that from occurring.

During the last two weeks, there have been a number of developments in the debate over the agreement including:

—The congressional General Accounting Office, in a report to the House Foreign Affairs Committee, said the agreement is legally flawed (excerpts of the GAO analysis follow).

—Two former Department of Defense officials, Richard Perle and Frank Gaffney, sent a letter to Sen. John Glenn (D-Ohio) listing the major objections to the agreement enunciated by DOD when it was headed by former secretary Caspar Weinberger.

—The administration said it could not accept language in a compromise resolution of approval drafted by Sen. Alan Cranston (D-Calif.). The administration signaled, however, that it wants to continue talking about a conditional resolution of approval, so long as the conditions do not require renegotiation of the agreement.

—The administration confirmed that, based partly on a DOD analysis of ways of transporting plutonium from Europe to Japan, it will only approve air shipments of Pu that do not overfly or land in the U.S., except in an emergency. Sen. Frank Murkowski (R-Alaska) may try to nail down the administration's assurances in law by offering an amendment to the Price-Anderson Act extension bill. The Senate is expected to clear that bill March 18.

—The Japanese government March 11 sent the agreement to the Diet for formal approval, which is expected before the current session ends May 25.

Under the Cranston proposal, Congress would approve the agreement with the following conditions: Japan would be given programmatic approval to ship U.S.-controlled material to and from Europe and to use that material in all existing facilities. The approval would have to be renewed every five years, however. The U.S. would reserve the right to approve the use of U.S.-controlled material in facilities not yet constructed. The resolution would also, according to a Cranston staffer, assert that the U.S. has "unfettered" suspension rights under the agreement.

The staffer termed the language "a very modest proposal." But the administration informed Cranston that his language would be inconsistent with the language of the agreement and, therefore, was not acceptable. However, the administration did propose further discussions with Cranston and other key Senate and House members on crafting conditions for an approval resolution.

The Perle-Gaffney letter said DOD under Weinberger found the agreement "seriously flawed. Two aspects were especially troublesome. First, it gives to Japan advance U.S. consent to reprocess and use U.S.-originated Pu in any Japanese facility it chooses, without restriction as to quantities, purpose, or economic justification and for a very long period into the future.

"Second, it imposes extraordinary and unprecedented restrictions on the right of the U.S. to suspend that prior consent should further circumstances warrant such action during the life of the agreement."

The letter went on to say: "The point is not that we are particularly concerned that Japan may wish to divert weapons-grade material to military purposes. It is, rather, the importance we attach to the case-by-case approach to acting on these matters. We believe that the case-by-case approach is fundamental to a policy of discouraging proliferation."

Administration officials downplay the significance of the Perle-Gaffney letter, noting that current Defense Secretary Frank Carlucci supports the agreement.

In a letter to Murkowski on the transportation of Pu, State Department Under Secretary for Political Affairs Michael Armacost said: "The administration is prepared to rule out the prospect of air shipments of Pu subject to the agreement from overflying or landing in the U.S., except in the case of aircraft emergency. As our first priority, we will pursue transportation plans calling for nonstop polar air shipment between the country of origin and Japan. To take account of a possible aircraft emergency, these transportation plans would provide for emergency landing sites at military facilities located away from heavily populated areas.

"We will also continue to review other potential air routes which would not require refueling in or overflight of the U.S. In order to provide the possibility for alternatives to air shipments, we will also consider programmatic shipment by sea under adequate physical security. We will be confirming to the government of Japan, prior to the completion of congressional consideration of the agreement, that these are the alternatives which will be pursued to implement the agreement."

—Michael Knapik, Washington

GAO SAYS U.S.-JAPAN AGREEMENT DOES NOT MEET AEA REQUIREMENTS

The following excerpts are from a letter dated February 29 from the comptroller general of the U.S., who is the head of the congressional General Accounting Office (GAO), to Rep. Dante Fascell (D-Fla.), chairman of the House Foreign Affairs Committee. In a Janaury 29 letter, Fascell had asked GAO for an analysis of the proposed nuclear cooperation agreement between the U.S. and Japan.

We conclude that the proposed Agreement does not meet the requirements of subsections 123 (a) (5) and (7) of the (Atomic Energy) Act or the timely warning standard of Section 131. Although the Act does not explicitly require that consent or advance approvals only be granted under the subsequent arrangement process or on a request-by-request basis, it is clear from the structure of the Act and its legislative history that it was anticipated that the guaranties of consent and prior approval over retransfer and reprocessing activities would provide the United States with the opportunity to apply the substantive standards of the subsequent arrangement process, including timely warning, in a systematic and effective manner. This is particularly true when the reprocessing or retransfer of plutonium involves a non-nuclear weapons state.

The Implementing Agreement that accompanies the proposed Agreement for Cooperation provides blanket approval for reprocessing within Japan and the return of plutonium from third countries to Japan that would leave the United States with no effective control over the life of the proposed Agreement for these activities. The United States would have to rely solely on the monitoring of these activities by the executive branch, as opposed to before-the-fact determinations made through the subsequent agreement process. The United States would also have to rely on its ability in the extreme case to terminate the proposed Agreement or or suspend the Implementing Agreement to ensure that the reprocessing within Japan and the return of plutonium to Japan, does not, over the 30-year Agreement, create increased risk of proliferation. Further, advance approval deprives the Congress of its oversight function.

We do not believe the Act intended that the subsequent decision-making or oversight of the United States would be based only on the executive branch's assessment of the implementation of the activities authorized by a one-time blanket approval for reprocessing activities and the subsequent return of plutonium to a non-nuclear-weapon state such as Japan. Nor did the Congress anticipate that United States oversight would be limited to its ability to terminate or suspend an agreement under certain extreme conditions.

Rather, we think that by providing for a separate section in the Act on subsequent arrangements and requirements for consent and prior approval over retransfer and reprocessing activities, that the Congress sought to ensure that the United States would maintain effective controls over these activities through application of the standards of the subsequent arrangement process in a meaningful way.

We think that it is particularly difficult to apply the timely warning standard to advance approvals that involve reprocessing in or the transfer of plutonium to a non-nuclear-weapon state. In our view, it cannot be asserted with any degree of confidence that over the succeeding 30-year period the technical capabilities of the cooperating party*, anticipated conversion times, safeguards capabilities, United States political relationships with the cooperating party, etc. would all be such as to assure the existence of timely warning at all times or even ensure there would be no increase in proliferation risks over the life of the agreement. Accordingly, we do not think that the timely warning standard can be applied in a systematic and effective way to the blanket approvals at issue here.

Finally, we recognize that Japan is an advanced nuclear nation that is seeking nuclear cooperation on a long-term, predictable, reliable basis. However, the Act does not differentiate between advanced nuclear countries that have not detonated nuclear weapons and those that have. Rather, the Act applies heightened scrutiny to non-nuclear-weapon states, whatever their state of advancement. Since Japan is a non-nuclear-weapon state, the timely warning standard must be applied as intended by the Act.

There is, however, flexibility in the Act. The Act provides for a type of generic or programmatic approval process, that we believe would provide Japan with the long-term, predictable terms it needs while still allowing the United States to maintain effective oversight. Under Subsection 131 (a) (3), the terms and conditions necessary for the approvals associated with reprocessing can be included in the Agreement. However, the actual approval is still provided under the subsequent arrangement process, but in an expedited manner.

Our more detailed analyses are included in the enclosed legal memorandum.

Sincerely yours,

Comptroller General of the United States

**We recognize that from a strictly technological base, Japan can hardly be distinguished from a nuclear-weapon state in that it has the scientific expertise and nuclear material necessary to construct a nuclear explosive device. However, as the Departments of State and Energy make clear in their analysis, should Japan choose to build a nuclear explosive device, it would need to acquire unique equipment and production facilities not presently available domestically in Japan.*

encourage it to do so, the U.S., beginning under the Carter Administration, proposed an approach which would give Japan reasonable assurance of U.S. consent to certain specified activities on a long-term basis, provided nonproliferation conditions acceptable to the U.S. are maintained. It is the inclusion of these assurances, commonly referred to as "programmatic approval," that is primarily responsible for the objections to the new agreement.

Critics argue that the programmatic approval feature makes the tougher standards of the new agreement ineffective, but this conclusion is based on misunderstanding both of the very limited prior consent provisions of the current agreement and of the programmatic approval feature of the new agreement. Although approvals under the current agreement have generally been granted in recent years on a case-by-case basis, there is no requirement to this effect in the agreement, and approvals extending for considerable periods of time have in fact been granted both by the previous and present administrations. Moreover, there is no provision in the current agreement for the revocation of approvals once given. In contrast, the programmatic approvals extended by the new agreement can be revoked unilaterally by the U.S. for a wide range of reasons, including the exact standard specified by the Nonproliferation Act: a significant increase in the risk of nuclear proliferation. It is no secret that U.S. insistence on the right to revoke the programmatic approvals was strongly resisted by Japan and accounted for much of the delay in negotiating the new agreement.

In short, under the current agreement, U.S. approvals are customarily granted on a case-by-case basis, with a strong presumption that they will be forthcoming, while under the new agreement, some U.S. approvals are extended on a long-term basis, with a broad right of unilateral revocation. This is not a distinction without a difference; it is intended to and does provide Japan, for good reasons, an improved assurance of the predictability of U.S. consent. But it is a difference in degree and not in kind and, as such, a dubious basis for an unprecedented rejection of an agreement of this type.

While the new agreement poses important issues, these do not include an increased risk of proliferation by Japan, or even Japanese access to plutonium. As even critics of this agreement acknowledge, Japan's commitment to nonproliferation, arising out of its wartime experience, is deep and abiding. It is not likely to be abandoned by anything short of the withdrawal or failure of our mutual security guarantees. Moreover, Japan already possesses substantial amounts of plutonium derived from non-U.S. sources which is outside of our control under either the current or the new agreement. This amount is increasing steadily, reaching an estimated 10,000 kilograms by 2000.

In the final analysis, the argument against approval of this agreement is that it sets a bad precedent for hypothetical agreements yet to be negotiated with other countries with less reliable nonproliferation credentials than Japan, but discrimination based on differing circumstances and our own national interest is the rule rather than the exception in foreign and national security policy. In keeping with this, our nuclear agreements have never been uniform, and the administration has stressed that the policy of programmatic approval is a limited one that will not be extended to other countries where it makes no sense. Even if this or a future administration were to attempt such an extension, the Congress has ample authority to reject any such agreement. To disapprove this agreement with Japan on the speculative basis that similar provisions might someday be extended to an inappropriate party will simply accelerate the process, already well advanced in Japan and elsewhere, of switching to sources of nuclear supply independent of the United States, as occurred when a previous attempt at uniformity was pursued in the late 1970's.

But the importance of the new agreement must be seen in a broader context than bilateral relations or even of overall nonproliferation policy. Rejection of the new agreement following five years of negotiation on a basis of which the Congress was informed at the outset will be viewed as a further example of U.S. unpredictability and unreliability. Such actions severely undermine U.S. credibility not only as a nuclear supplier and nonproliferation policy partner, but in other areas as well, including trade and our vital mutual security commitments. Their net effect is to reduce rather than enhance the effectiveness of our nonproliferation policies.

Sincerely,

Myron B. Kratzer.

The PRESIDING OFFICER. Who yields time?

Mr. PELL. I suggest the absence of a quorum, the time to be equally divided.

The PRESIDING OFFICER. Is there objection to the request?

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. GLENN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

MR. GLENN. Mr. President, the distinguished floor manager of the bill had to leave. I will be acting floor manager until he returns. I yield myself such time as I may require.

Mr. President, Congress has now had 5 months to review the administration's proposals for revising our Nuclear Cooperation Agreement with Japan. This agreement does not expire until the year 2003. There is little reason to see why this whole thing came up at this time when it was working quite well on a case-by-case basis. It leaves us no choice here. The time has come for Congress to make its choice.

The question is, do we accept a seriously flawed agreement that has received strong bipartisan opposition in both Houses—I stress bipartisan opposition in both Houses—or do we return it to the Executive with instructions to bring it into conformity with U.S. laws?

I will have something to say about that later. I consulted with my good friend Dante Fascell in the House a few moments ago. They have a GAO study that they commissioned over there and which was being held for later release. But he has given us permission to use whatever information we need out of that report, which indicates that this agreement does not agree with U.S. laws. I will bring that up a little bit later.

My view is, however, we do not have a choice. We have heard the Executive's case for the agreement, and we have seen the unwillingness of the State Department to consider serious remedies to the problems that Congress has discovered. The time has come for Congress to reject this proposed agreement.

I hate to say that. I truly do, because I consider myself a good friend of Japan. I have been there many, many times. I have dealt with them on a number of different issues. Anything I say in this regard is not a slap at Japan now, but what we are talking about is a 30-year prior approval for shipping fuel out, plutonium back, plutonium shipments back and forth, in either direction. We have never done that with any other nation, not to that extent. We have 30-year agreements that cover more limited items but nothing that ever has said we are going to give a 30-year approval in advance.

That does not mean to say that I am suspicious of Japan or their motives. Nothing whatsoever should be construed as meaning that. I do not want to set a precedent that other nations, perhaps less reliable nations than Japan, are going to insist on the same thing or consider us unfriendly. I think the time has come to reject this agreement.

The House Foreign Affairs and Senate Foreign Relations Committees have demonstrated both their leadership and good judgment in scheduling a variety of hearings on this important subject. They have been held. These committees deserve a lot of credit for ganting this issue the time and attention that it so richly deserves.

In testimony before the Senate Foreign Relations Committee last December, I called this proposed agreement "perhaps the most significant nuclear cooperation agreement in history."

If anyone thinks I am exaggerating, consider the implications of the following, not just for our relations with Japan but for our global role in the international nuclear regime.

I already mentioned the first. It is a 30-year prior approval, a 30-year prior approval for their transfers, 30 years in advance. We have not done that with other nations; no other agreements permit that to the same extent this agreement does.

So that is the No. 1 item and, by far, the most important objection to this treaty.

Let us go to another one. The agreement will promote, and certainly at least permit and probably promote, massive international commerce in weapon-usable plutonium of U.S. origin well before international environmental and security controls can handle such traffic.

Another one: The agreement will relinquish the right of the executive branch, of Congress and the U.S. public to review the individual circum-

Is this just my opinion? I am not a lawyer. I am not really qualified to read all the fine print in some of these things and say what is or is not legal. I suppose in some of these treaties I am just as qualified as anybody else, but the legal background necessary to go into some of this is not something I possess.

So let me give you somebody else's opinion. It is not just my opinion. It is the opinion of the General Accounting Office, the investigative arm of Congress, and I can assure you they have plenty of people over there who have been through all of these things with a fine-tooth comb, are accustomed to looking into these things. The GAO did a legal analysis of the agreement for Congressman Dante Fascell over in the House, chairman of the House Foreign Affairs Committee.

Let me give full credit here to Dante Fascell; because he had this study done by GAO. They did an excellent job. They brought it back to him—but a copy of this somehow got out before its official release. Chairman Fascell was the one that commissioned the report, and he was supposed to have it for 30 days.

I do not know what happened and I know it was not my staff that released this. We certainly did not; did not have any contact with it. But since the report had been prematurely, released, I called him a while ago from the Cloakroom here and Dante Fascell, being the gentleman that he is and being interested in this subject as he is, gave me permission to go ahead and use whatever information out of this report I wished to use.

That is a comity that I certainly do appreciate. I want to speak publicly and let him know how much I appreciate his willingness to do that because it does bear very directly on our debate here that will run out either this evening or some time early tomorrow. It bears very directly on it because the Proxmire amendment, as I said, says that there can be no violation of law without it coming before the Congress here and so the GAO has done this analysis for Chairman Fascell. I wish he could be over here right now because I would like him to be here to take full credit for having commissioned this report and also for giving me permission to use it here this afternoon, which, as I said, I very much appreciate.

This is about a 4-page single-space letter but I think it is important enough that I read this whole thing into the Record and I will do so now. It is from the Office of the Comptroller General. It is signed by the Deputy Comptroller. But it is back to Hon. Dante B. Fascell, chairman, Committee on Foreign Affairs, House of Representatives.

Dear Mr. Chairman: This is in response to your January 29, 1988, letter requesting our analysis of the proposed Agreement for Cooperation between the Government of the United States and the Government of Japan Concerning Peaceful Uses of Nuclear Energy (Agreement).

In subsequent conversations with your staff, it was agreed that our review of the proposed Agreement would focus on whether the advance approvals for the reprocessing and retransfer of United States-origin nuclear material would meet the requirements of the Atomic Energy Act of 1954 (Act), as amended. In particular, you wanted our views on whether the requirements provided in Section 123 of the Act that the Agreement contain guaranties of United States consent and prior approval for retransfer and reprocessing activities are satisfied by the proposed Agreement and if the standard of timely warning provided in Section 131 of the Act would be met under the terms of the proposed Agreement.

As you are aware, the Agreement is the most fundamental legal mechanism by which nuclear cooperation is regulated between the United States and other nations. It includes the general "terms, conditions, duration, nature and scope of the cooperation." 42 U.S.C. § 2153. Section 123 of the Atomic Energy Act of 1954, as amended, addresses the substantive and procedural requirements of the Agreement. Subsection 123(a) prescribes nine requirements that must be included in the Agreement. Of concern here are (1) a guaranty by the cooperating party that any material transferred pursuant to the Agreement will not be transferred to unauthorized persons or beyond the jurisdiction or control of the cooperating party without the consent of the United States, and (2) a guaranty by the cooperating party that no material transferred pursuant to the Agreement will be reprocessed without the prior approval of the United States. 42 U.S.C. § 2153(a)(5), and (7).

On the other hand, subsequent arrangements are specific contracts, approvals, authorizations and other arrangements required to implement an Agreement. See 42 U.S.C. § 2160; S. Rep. No. 467, 95th Cong., 1st Sess. 10 (1977). Section 131 of the Act regulates subsequent arrangements. The subsequent arrangement provision provides the test the executive branch must apply in evaluating (1) whether to approve a request for reprocessing of spent nuclear fuel that had originally been exported or produced through the use of any nuclear materials and equipment or sensitive nuclear technology exported from the United States; or (2) whether to approve the transfer back of the plutonium in quantities greater than 500 grams resulting from the reprocessing for use in another nuclear reactor. The Act mandates that United States authorization for such reprocessing or retransfers not result in a significant increase of the risk of proliferation of weapons beyond that which exists at the time the approval is requested. In addition, the statute requires that:

"* * *Among all the factors in making this judgment, foremost consideration will be given to whether or not the reprocessing or retransfer will take place under conditions that will ensure *timely warning* to the United States of any diversion well in advance of the time at which the non-nuclear-weapon state could transform the diverted material into a nuclear explosive device." (Italic added.)

The Act explicitly ties the timely warning standard to non-nuclear-weapon states. This is because a non-nuclear-weapon state has not previously been known to have detonated a nuclear explosive device. Accordingly, there is a heightened risk of proliferation when reprocessing or the return of plutonium involves a non-nuclear-weapon state.

Japan is a non-nuclear weapon state. In the past, Japanese requests for approvals for reprocessing or the retransfer back of plutonium from a third country have been provided on a request-by-request basis under the subsequent arrangement process. The proposed Agreement in the accompanying Implementing Agreement, however, provides blanket authority to Japan to reprocess and store United States-origin nuclear material within Japan, as well as the authority to transfer spent fuel to designated facilities in England and France for reprocessing and have the resulting plutonium subsequently returned. The consents and prior approvals for these activities would last the life of the Agreement and apply to facilities within Japan not yet in existence.

We conclude that the proposed Agreement does not meet the requirements of subsections 123(a) (5) and (7) of the Act or the timely warning standard of Section 131. Although the Act does not explicitly require that consent or advance approvals only be granted under the subsequent arrangement process or on a request-by-request basis, it is clear from the structure of the Act and its legislative history that it was anticipated that the guaranties of consent and prior approval over retransfer and reprocessing activities would provide the United States with the opportunity to apply the substantive standards of the subsequent arrangement process, including timely warning, in a systematic and effective manner. This is particularly true when the reprocessing or retransfer of plutonium involves a non-nuclear-weapon state.

The Implementing Agreement that accompanies the proposed Agreement for Cooperation provides blanket approval for reprocessing within Japan and the return of plutonium from third countries to Japan that would leave the United States with no effective control over the life of the proposed Agreement for these activities. The United States would have to rely solely on the monitoring of these activities by the executive branch, as opposed to before-the-fact determinations made through the subsequent arrangement process. The United States would also have to rely on its ability in the extreme case to terminate the proposed Agreement or suspend the Implementing Agreement to ensure that the reprocessing within Japan and the return of plutonium to Japan, does not, over the 30-year Agreement, create increased risks of proliferation. Further, advance approval deprives the Congress of its oversight function.

We do not believe the Act intended that the subsequent decision-making or oversight of the United States would be based only on the executive branch's assessment of the implementation of the activities authorized by a one-time blanket approval for reprocessing activitie[illegible] the subsequent return of plutonium [illegible]on-nuclear-weapon state such as Japa[illegible] did the Congress anticipate that United States oversight would be limited to its ability to terminate or suspend an agreement under certain extreme conditions.

Rather, we think that by providing for a separate section in the Act on subsequent arrangements and requirements for consent and prior approval over retransfer and reprocessing activities, that the Congress sought to ensure the United States would maintain effective control over these activities through application of the standards of the subsequent arrangement process in a meaningful way.

We think that it is particularly difficult to apply the timely warning standard to advance approvals that involve reprocessing in or the transfer of plutonium to a non-nuclear-weapon state. In our view, it cannot be

asserted with any degree of confidence that over the succeeding 30-year period the technical capabilities of the cooperating party,[1] anticipated conversion times, safeguards capabilities, United States political relationships with the cooperating party, etc. would all be such as to assure the existence of timely warning at all times or even ensure there would be no increase in proliferation risks over the life of the agreement. Accordingly, we do not think that the timely warning standard can be applied in a systematic and effective way to the blanket approvals at issue here.

Finally, we recognize that Japan is an advanced nuclear nation that is seeking nuclear cooperation on a long-term, predictable, reliable basis. However, the Act does not differentiate between advanced nuclear countries that have not detonated nuclear weapons and those that have. Rather, the Act applies heightened scrutiny to non-nuclear-weapon states, whatever their state of advancement. Since Japan is a non-nuclear-weapon state, the timely warning standard must be applied as intended by the Act.

There is, however, flexibility in the Act. The Act provides for a type of generic or programmatic approval process, that we believe would provide Japan with the long-term, predictable terms it needs while still allowing the United States to maintain effective oversight. Under Subsection 131(a)(3), the terms and conditions necessary for the approvals associated with reprocessing can be included in the Agreement. However, the actual approval is still provided under the subsequent arrangement process, but in an expedited manner.

Our more detailed analyses are included in the enclosed legal memorandum.

Sincerely yours,

And it is signed.

Mr. President, I want to repeat that I do not question Japan in this regard. What I do question is setting a precedent for this agreement with Japan that could be used with other nations.

Mr. President, the message of this GAO legal memorandum is that the agreement does not meet the requirements of law. The GAO memorandum, I repeat, states unequivocally that the agreement does not meet the requirements of existing law.

If the administration were straightforward on this issue, they would take the agreement back and either renegotiate it so it meets the provisions of law, or they would send it back here with a waiver, thus triggering the Proxmire amendment that requires positive approval of the agreement by both Houses.

The truth is the administration does not want to do this. It does not want to do it because it knows I think, that they entered into a bad agreement with the Japanese nuclear industry, a bad agreement that takes Congress out of the loop of oversight of the shipments of plutonium to Japan. It takes us out whether we like or not without changing any law. This agreement will effectively alter U.S. law.

I think it is a bad agreement that removes U.S. consent rights that have served us well over the past years. What has not worked well with Japan? Can anyone tell me? The agreement is there until the year 2003. Let us see how it works. Maybe we can negotiate a different agreement by the year 2003. This agreement has worked well in past years. No one has quarreled with that.

This is a bad agreement also because it creates a precedent for other countries to seek plutonium on the same basis as Japan. It is a bad agreement that contains the seeds for a future disaster for U.S. national security.

I do not know why our negotiators seem to have been beaten down. Maybe that is too strong a term. But certainly they were worn down by the Japanese negotiators. In other words, we gave the Japanese the advantage of special treatment.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. GLENN. Will the Senator yield an additional 2 minutes?

Mr. PELL. I yield 2 additional minutes.

Mr. GLENN. There is no reason that we have to provide this special treatment. Japan has done well under the existing agreement. I have no quarrel with Japan on the way this agreement has been administered. There is no reason to scrap it for a new agreement that undermines our antiproliferation laws, our commitment to strengthen controls over nuclear weapons and useable nuclear materials. In doing so, it undermines our national security.

So I urge this new and unneeded agreement be rejected.

Mr. President, once again, let me give my appreciation to Chairman DANTE FASCELL, chairman of the Committee on Foreign Affairs. He had this report back from the Comptroller General. He had requested it. But today in the interest of making certain that all material was out, he gave me permission to use this. I was happy to read it into the RECORD fully.

The report is more complete than that. This is the summary record of it, but I believe it states all the major points. The report documents that this agreement breaks our laws.

So thanks again to my good friend, DANTE FASCELL, over in the House. We are all trying to work together so we make sure our nuclear future is weapons-free in this world. Mr. President, I ask unanimous consent that various related materials be printed in the RECORD, and I yield back my time.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

[From the Washington Post, Oct. 11, 1981]

ADMINISTRATION MOVING TO LOOSEN LAWS ON CURBS FOR NUCLEAR WEAPONS ABROAD

(By Don Oberdorfer)

The Reagan administration is moving toward adoption of a highly controversial program to sweep away the most binding aspects of current laws on retarding the spread of nuclear weapons abroad, according to documents circulated to senior officials.

Among other things to be considered in an October 19 meeting of nuclear control policy makers, according to the papers prepared for the session, are:

Transferring to the State Department all the export licensing functions of the Nuclear Regulatory Commission, an independent agency established by Congress as a check on executive decisions in this field.

Repealing the current provisions of law that cut off U.S. nuclear exports as well as military and economic assistance to nations moving toward producing atomic weapons for the first time.

Weakening current laws requiring countries without atomic weapons to permit international inspection of all their nuclear facilities in order to continue buying nuclear materials from the United States.

Together with other announced or impending decisions in the nuclear field, acceptance of such proposals would represent a full-scale turnabout in governmental policy. The increased strictness with U.S. nuclear exports that followed the global shock waves of India's 1974 atomic test would give way to a much greater official permissiveness, with reliance instead on American standing as a "reliable supplier" for leverage to discourage the spread of atomic weapons.

Meanwhile, the United States' own expanding nuclear weapons program will mean a dramatic increase in domestic production of weapons-grade plutonium, according to government sources. And the Reagan administration followed up its recent policy announcements in favor of the nuclear power industry by saying it would pick up a share of the cleanup costs at the disabled Three Mile Island plant in Pennsylvania.

Assistant Secretary of State James L. Malone, chairman of the interagency group considering the policy changes, wrote in an October 2 memorandum that "preliminary and informal" consultations with Congress are to follow the October 19 discussions. A final decision paper will then be drafted for more executive discussions and, ultimately, President Reagan's signature.

The documents circulated by Malone, partly in the form of "pro" and "con" discussion of the major proposals under consideration, explicitly state that powerful congressional opposition can be expected. This likely opposition and the major legislative effort which would be needed to overcome it, are the main factors cited in the "con" column for the most sweeping proposals.

Several outspoken backers of current antiproliferation laws and policies were cited in the interagency document as probable opponents of the proposals for change. When contacted yesterday by The Washington Post, some of them made clear that a battle royal will erupt if Reagan adopts the proposals now under discussion.

Senator John Glenn (D-Ohio) said the repeal of the current sanctions against nations moving toward a nuclear weapons capability would leave "a toothless policy" and would tend to treat nuclear matters abroad as "just another business development like selling automobiles or washing machines."

Among the sanctions that are being considered for elimination are those sponsored by Glenn and by former senator Stuart Symington, which bear their names, and sanctions provisions of the Nuclear Non-Proliferation Act of 1978. Glenn said he believes chance for life on this planet. I thank the chairman.

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[1] We recognize that from a strictly technological base, Japan can hardly be distinguished from a nuclear-weapon state in that it has the scientific expertise and nuclear material necessary to construct a nuclear explosive device. However, as the Departments of State and Energy make clear in their analysis, should Japan choose to build a nuclear explosive device, it would need to acquire unique equipment and production facilities not presently available domestically in Japan.

Mr. EVANS and Mr. PELL addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington.

Mr. EVANS. Thank you, Mr. President.

Mr. President, it is hard sometimes to write fast enough to keep up with some of the rather misleading arguments which have been used here this afternoon. Let me begin with the most recent—somehow the belief that by signing this agreement there will suddenly be authorization for Japan to fly tons of plutonium over American territory and landing at American airports. That simply is not the case, will not be the case, and should not be the case. In the first place, any transportation plan under the new agreement requires approval of both parties. It must be negotiated quite explicitly, and we have full and absolute authority to make any determinations and put any requirements we choose to in that transportation arrangement.

In addition to that, the State Department has sent a letter to Japan on behalf of the United States making that very explicit kind of determination. And we have no fears whatsoever that somehow under this agreement there will be the landing of any amounts of plutonium in Washington, Alaska, or anywhere else in the United States. Transportation plans have yet to be determined, and once they are determined they have to be approved by both parties. The United States has full and absolutely unilateral authority to say no to a plan with which it does not agree.

It has been suggested that it will be flying in casks that are not yet certified. Under this agreement no plutonium would be carried in casks that are not certified. They must meet NRC regulations today. If the Nuclear Regulatory Commission establishes stronger requirements for casks in the future, all casks must meet NRC regulations as well as Japanese regulations, but we have the authority unilaterally to say, "These are the regulations that you must live up to." And if at some time in the future this Congress decides that it, by law, wishes to further extend requirements for casks, it can do that, and that becomes the minimum requirement.

Mr. President, some of the talk here today has been as if suddenly we are back in 1968; that nothing has changed in 20 years; we would all wish that the world had not changed in 20 years, but it has. We are now in 1988. And the question is, what do we do now that is best for ourselves, our security, our future, and our relationship with Japan. It is not to simply stagger along under the old agreement which has much less coverage than the new agreement, much less opportunity to give guidance to other nations, and to have anything to say about what they choose to do in the future.

France, Japan, the United Kingdom, three of our closest friends and allies, all have chosen to move in a way that will create breeder reactor programs which would use plutonium or reprocessed fuel, and that has been their choice. They are there. We are not going to convince them to go in a different direction.

In this relationship with Japan, we have to deal with a nation that has made some decisions, that is moving toward breeder technology, has all of the sophistication and the scientific backing to do it on their own if they choose, and the worst thing in the world that could happen would be for us to abandon any kind of agreement with Japan and let them be set adrift to hook up with whomever they chose and to gain their necessary materials from whatever source they chose. They do not want to do that. We should not encourage them to do that.

Now, the Senator from Ohio has mentioned a GAO report, a legal analysis, as if it were the gospel coming from the Supreme Court. Mr. President, that GAO analysis, even by this nonlawyer Senator's review, is one that at best is a tentative analysis. It says, "We believe," and uses terms of that nature rather than explicitly and in detail setting forth the citations and the background and the analysis from which a real legal opinion ought to come.

Chairman Fascell was good enough to share the material he received from the GAO not only with Senator Cranston and Senator Glenn but with others as well, and I have here two legal analyses which have been made of the GAO report. Let me read from one of them, and then I will ask that both of them be included in the Record. In the introduction of a rebuttal of GAO legal analysis made by Mark Rowden, former NRC Commissioner, he ends his introduction by saying, "Careful analysis demonstrates, however, that those conclusions"—the conclusions of the GAO—"are unsupported by the cited provisions of that act or any other basis set forth in the subject GAO documents."

They very carefully go through the analysis and show in each and every element of the GAO analysis where they are either incomplete or have chosen the wrong analysis, or simply misunderstood current law. It is not one of the best analyses that has come out of the GAO, normally a fine organization.

Let me talk about just one of them. The question of timely warning, and the problems of increasing the risk of nuclear proliferation, the NRC document:

> * * * contests the validity and adequacy of the one-time, long-term advance approval contained in the Agreement and the absence of Congressional oversight on a case-by-case basis. Finally, it concludes that the "timely warning" evaluation cannot be made in an effective and systematic manner for a 30-year period into the future.
>
> The key to understanding why the substantive requirements of § 131(b)(2) are met lies in the provision for suspending the advance approvals and consents in the Implementing Agreement, which provides, in pertinent part: * * *.

Then he goes through the wording, the precise wording read by the Senator from Ohio when he talked about all of the provisos, and the requirements, and the definitions that would keep us from having any effective way to ensure that there was timely warning.

The Senator from Ohio said:

> Any decision on such suspension would only be taken in the most extreme circumstances of exceptional concern from a nonproliferation or national security point of view * * *.

Of course, that is what ought to happen. Those are precisely the times we ought to be concerned. But the guiding part of this whole thing is either party may suspend the agreement that has been given in article I of this implementing agreement in whole or in part to prevent—and then underline "a significant increase" in the risk of nuclear proliferation.

The Senator from Ohio talked about that being an extraordinarily difficult task.

Mr. President, this analysis goes on to point out that:

> What is most important to note in the foregoing provision is that one of the reasons for suspension of the consents is identical to the determination which the Secretaries of State and Energy must make to prove a subsequent arrangement under § 131(b)(2)—no "significant increase in the risk of proliferation."

Those are identical words in the existing law and in the new agreement.

It goes on to say:

> This identity of standards is crucial, because it means that the consent may be withdrawn (in whole or part, as required) in the very same circumstances which would have caused the Secretaries to deny approval on a request-by-request basis.

Mr. President, I ask unanimous consent that the legal analyses from the Department of State and the rebuttal of the GAO legal analysis of Mark Rowden, former NRC Commissioner, be included in the Record.

There being no objection, the material was ordered to be printed in the Record, as follows:

COMMENTS ON FEBRUARY 29, 1988 LETTER FROM COMPTROLLER GENERAL TO DANTE FASCELL—WITH AN ENCLOSED LEGAL MEMORANDUM—CONCERNING PROPOSED AGREEMENT FOR COOPERATION WITH JAPAN

The letter and enclosed analysis are fundamentally flawed in two ways: (1) errors of fact or in characterization of the proposed agreement; and (2) errors in analysis. The legal conclusions reached—that the proposed Agreement does not meet the requirements of subsections 123(a) (5) and (7) of the Atomic Energy Act or the timely warning standard of Section 131—are not supported by the analysis presented and are contrary to the views of all of the responsible Executive branch agencies, as well as the

THE NEW YORK TIMES, SUNDAY, MARCH 13, 1988

Compromise Is Offered on Japan Nuclear Pact

By **MICHAEL R. GORDON**

Special to The New York Times

WASHINGTON, March 12 — To ease Congressional concerns over a nuclear agreement with Japan, the Reagan Administration has developed a plan to fly plutonium from Europe to Japan in a polar route that would not cross American and Canadian territory.

The plan was confirmed in a letter sent this week to Senator Frank H. Murkowski, Republican of Alaska, from Michael H. Armacost, Under Secretary of State for Political Affairs.

Mr. Murkowski and other members of the Alaskan delegation have been critical of the nuclear cooperation agreement because the Administration had been considering a plan that would have permitted flights of nuclear fuel across Alaska.

The agreement, signed in November, would give Japan advance consent for 30 years to recover the plutonium from fuel the United States provides for Japan's nuclear plants.

To do this, Japan would ship the spent fuel it already has to reprocessing sites in Europe, which would separate plutonium from the waste. The plutonium would then be shipped back to Japan by air. Under a previous agreement, such shipments had to be approved on a case-by-case basis.

The Administration has calculated that Congressional opposition can be overcome if the concern over how the plutonium is to be shipped is met.

But Senator Alan Cranston, Democrat of California, and Senator John Glenn, Democrat of Ohio, among other senators are sharply critical of the agreement, and may push for a vote early next week on a resolution expressing disapproval of the agreement.

The critics assert that the agreement would encourage a dangerous international trade in plutonium, that it would increase the risk of terrorists acquiring plutonium and that it is inconsistent with the terms of the Atomic Energy Act.

The position of the critics is buttressed by a report by the General Accounting Office, which has not yet been made public. The report concludes that the agreement "does not meet the requirements" of the act governing the transfer of plutonium.

The report by the General Accounting Office, the investigative arm of Congress, was prepared for the House Foreign Affairs Committee and says the Atomic Energy Act should not be interpreted as allowing "one-time blanket approval" for reprocessing and shipping plutonium over a 30-year period. The report also says that the agreement "deprives the Congress of its oversight function."

The Administration has argued that the agreement is consistent with the act.

In his letter to Senator Murkowski, Mr. Armacost said the Administration's "first priority" in devising a plan to ship the plutonium calls for non-stop polar shipments between Europe and Japan. The planes would land in Alaska only if there was an emergency, and the landing sites would be at military installations far from population centers.

The letter said the Administration will also continue to review other possible air shipment routes, as well as arrangements for shipping the plutonium by sea.

A Pentagon report provided to Congress this month says the best way to ship the plutonium is by civilian planes. The report says shipments by sea would require naval escorts to protect against theft or sabotage. The Pentagon is reluctant to provide such an escort, arguing that it would be expensive and would divert American vessels from possible military missions.